TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 205.

WILLIAM J. TURPIN, APPELLANT,

vs.

J. B. LEMON AND A. W. LEMON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED NOVEMBER 1, 1902.

(17,956.)

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vs.

J. B. LEMON AND A. W. LEMON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 11, 1901.

a In the Circuit Court of the United States for the District of West Virginia, in the Fourth Circuit, at Parkersburg.

WILLIAM J. TURPIN
v.
J. B. LEMON and A. W. LEMON. } In Equity.

Merrick & Smith, Parkersburg, W. Va., counsel for complainant.
McCluer & Forrer, Parkersburg, W. Va., counsel for defendants.

1 Be it remembered, that, heretofore, to wit, on the 15th day of April, 1899, came William J. Turpin, by counsel, and filed his bill of complaint against J. B. Lemon and A. W. Lemon, which said bill of complaint is is the words and figures following, to wit:

Bill of Complaint.

The bill of complaint filed in said court by William J. Turpin, a citizen of the State of Pennsylvania, against J. B. Lemon and A. W. Lemon, citizens of the State of West Virginia.

To the honorable judges of the circuit court of the United States for the district of West Virginia:

Your orator, the said Wm. J. Turpin, says that he is, and for a number of years past has been, a citizen of the State of Pennsylvania, and that the defendants J. B. Lemon and A. W. Lemon are citizens of the State of West Virginia.

Your orator also says that on the 30th day of April, 1874, he received from Virginia S. Hall, executrix and William H. Hall, executor of the last will of Smith C. Hall, a deed conveying two hundred and twenty-five acres of land lying on the waters of Dutchmen run in the county of Ritchie and State of West Virginia, which deed is filed herewith as Exhibit No. 1. That your orator became thereby the owner in fee-simple of said tract of land and has so continued to the present time except for the pretended tax sales hereinafter mentioned.

That, in the year 1879, by a pretended tax sale made by the sheriff of said county, at that time, one hundred acres of said land was sold to D. McGregor and James McKinney, and by said pretended tax sale it was claimed that the quantity of land owned by your orator was reduced to one hundred and twenty-five acres of said
2 tract of land and thereafter, for some years, there continued to be assessed upon the assessor's books of said county of Ritchie, a tract of one hundred and twenty-five acres, lying on Dutchmen's and Laurel runs, in the district of Murphy, in said county, assessed with taxes in the name of your orator. And the same appears to have been so assessed in the years 1883 and 1884, as will appear by abstracts from the assessor's books for those years, marked Exhibits Nos. 2 and 3 respectively and filed as part hereof. That afterwards, as appears from the records of said county, there

was a pretended return of delinquency for the taxes charged in your orator's name upon said land as aforesaid, as will appear from abstracts of the delinquent lists for those years filed herewith as Exhibits Nos. 4 and 5 respectively.

That after the return of delinquency, as aforesaid, it is claimed that the sheriff of said county of Ritchie, made sale of said one hundred and twenty-five acres of land for the taxes of 1883 and 1884 charged to your orator as aforesaid upon said land, and that such sale was made on the 12th day of January, 1886. All that appears of record with regard to such sale and with regard to the authority for making such sale is shown by the abstract from the lists of sales returned by J. B. Hallom, sheriff of said county of Ritchie, for the sales of real estate sold in the month of January, 1886, and which is filed herewith as Exhibit No. 6.

Your orator further shows that after the return of said pretended sale, as aforesaid, by the said sheriff, to wit, on the 3rd day of February, 1887, a pretended tax deed was made by G. W. Amos, clerk of the county court of said county of Ritchie, to the said J. B. Lemon and A. W. Lemon, purporting to convey a certain tract of land containing one hundred and twenty-five acres on Dutchmen's
3 and Laurel run- as aforesaid, and described in said deed by the following description:

Beginning at a sugar tree, thence N. 48 W. 27 poles to a buckeye; N. 24½ W. 8 poles to a buckeye and pointers; N. 72 W. 38 poles to a maple; N. 4½ W. 56 poles to a gum; N. 41½ W. 36 poles to a sycamore; N. 54 W. 37 poles to —; N. 43 E. 6 poles to a gum, corner to F. Lemon; thence S. 65 W. 86½ poles to a stake; S. 23 E. 180½ poles to a stake; N. 65 E. 130½ poles to the beginning, containing 125 acres, be the same more or less. A copy of said deed is filed herewith as Exhibit No. 7; and your orator charges that such description is not sufficiently definite to locate said land and rendered the said deed void for uncertainty.

Your orator shows that for many years he has been absent from the said county of Ritchie and State of West Virginia, and has resided out of the same, not being a resident of the State of West Virginia or a citizen thereof, and that for many years your orator has been in very poor health and much of the time since the time of said pretended tax sale, your orator has been unfit to attend to business or look after the same. And while, owing to lapse of time which has past since the making of said sale, it may have seemed that your orator was neglecting his business and property interests in permitting such sale to be made and to go for this length of time without legal proceedings to set the same aside, yet your orator now states his illness and his consequent incapacity to look after his business interests, as a good and valid reason therefor.

Your orator further shows that the said tax sale and the deed made thereunder were invalid, illegal, null and void and passed no title to the said J. B. Lemon and A. W. Lemon for said one hundred and twenty-five acres of land, and the said deed is a cloud
4 upon the title of your orator to said land and should be set aside and declared null and void.

Your orator shows that the following defects appear of record with regard to said sale:

It nowhere appears from the return of said sale made by the said sheriff as aforesaid, that the said land had been certified to him to be sold by the auditor of the State of West Virginia, as required by law.

Second. That it nowhere appears in the return or certificate of said sheriff with regard to said sale that he published or posted the notice of the sale for taxes, as required by law and as required by the act of the legislature for the year 1882, under which it is presumed said sheriff was pretending to act.

Third. That it nowhere appears in said return or certificate of sales made by said sheriff, that said sale was made at a time at which he would be authorized by the said law to make such sale.

Fourth. That it nowhere appears in such return of sales or the certificate thereto that such sale was at a place at which the said sheriff was authorized to make it.

Fifth. That it nowhere appears by said return of sales, or the certificate thereto, that such sale was made at a public sale; that is, at public auction or outcry.

Sixth. That it is nowhere made to appear in said return of sales or in the certificate or affidavit thereto, that said land was sold to a person or persons who would take the least number of acres and pay the taxes thereon.

Seventh. There is no statement in said return of sales or in any certificate or affidavit attached thereto by said sheriff, either in general or special terms, that said sale was made in accordance with the provisions of said law, or of the laws of the State of West Virginia.

Your orator further shows that the said deed is void for the additional reasons that it is not in accordance with the returns of sale and the affidavit and certificate attached thereto, in this: that said deed states that said sale was made pursuant to the statute in such case made and provided, when there was no statement contained in the affidavit or return of the sheriff in any form that said sale was made pursuant to the statute in such case made and provided. And in this: that said deed recites that the said tax sale was commenced, continued and completed according to law, when such return of sale and the affidavit and certificate thereto, do not show or state either in general or special terms that said sale was commenced, continued and completed according to law. And such statements in said deed contained, as the record evidence shows, were without foundation in fact.

And in this: that the said deed alleges that the said J. B. Lemon and A. W. Lemon caused a roport to be made to the clerk of the county court specifying the metes and bounds of the real estate so purchased and giving a description thereof sufficient to identify the sale, as required by law. When, in fact, no such report is shown of record and no such report was recorded with said deed, as required by the statute in said case made and provided; and your orator charges that no such report was ever made, and that no such report

was ever recorded, as required by law; and your orator charges that the said J. B. Lemon and A. W. Lemon obtained and caused the said clerk to make the said deed without any such report and to place it upon record without such report. And your orator charges
6 that as the deed was made without such report and without recording such report, that the said deed conveyed no title to the said land to the said J. B. Lemon and A. W. Lemon. And that the said sale and deed, made under the circumstances and with the defects hereinbefore set forth and charged, were wholly null and void and passed to the said purchasers at said pretended tax sale no title, right or interest in or to the said one hundred and twenty-five acres of land.

Your petitioner further shows that the said tax sale and the said tax deed are void and without warrant *of* authority of law in this: that the action of the said sheriff and of the said clerk in making the said pretended tax sale and the said tax deed in the form and manner aforesaid, did not, under the first section of the fourteenth amendment of the Constitution of the United States, constitute due process of law and that, under the Constitution of the United States and under the constitution of the State of West Virginia, they were not sufficient to take away the property of your orator.

Your orator further shows that the acts of the legislature of the State of West Virginia, as contained in the Acts of 1882 and as now incorporated in the Code of West Virginia of 1891, do not provide with regard to the sale of lands returned delinquent for taxes and the making of deeds under such sales, what is due process of law as indicated by the constitution of the State of West Virginia and of the Constitution of the United States of America. And any sales and deeds made under such act and pursuant thereto are void as depriving persons of their property without due process of law, in this: that, while said acts provided specifically for certain acts of the officers mentioned, the sheriff and the clerk respectively, yet the same act, as now found in section 25 of chapter 31 of the Code of West Virginia of 1891, and as appears in the said section 25 of
7 the said Acts of 1882, chap. 130, in effect provide that any error, mistake, irregularity in the acts of such officers, the sheriff and the clerk as aforesaid, in making such sales and deeds, shall not effect the validity of such sales and of such deeds; thereby doing away with the requirements provided in the previous part of the act in making such sales and deeds, and leaving it entirely with each individual sheriff and clerk as to what portion of said law he will comply with in making such sale or deed, or whether he shall fulfill any portion of the same.

And your orator charges again that the act, so framed, does not provide for due process of law in the making of tax sale and deeds and any sales or deeds made thereunder are null and void and that, as it is apparent that the tax sale of January 12, 1886, made as aforesaid by the said sheriff of Ritchie county of said one hundred and twenty-five acres of land, and said deed made by said clerk as aforesaid, were made under the provisions of said act of 1882 the

same are null and void as having been made without due process of law and depriving your orator of his property without due process of law.

Your orator further shows that, by said act and by chap. 31 of sec. 12 of the Code of West Virginia, the sheriff was authorized to make his return of sales without showing in what way he had made his sales; without showing that he had published and posted the notice required by law; without showing that he had made the sale at a time and at a place required by law; and without showing that he had made said sale as a public sale; without showing that at such sale the land had been sold to the person who would take the least number of acres and pay the taxes charged upon the land, and without showing, even in general terms or by general statement, that such sale had been made in accordance with the laws or in accordance with the rules and regulations prescribed by the law under which such officer acted. So that, by the law the return of
8 sales would not show and could not show that the law had been complied with. And when such return of sale should be made under the law to the clerk of the county court and filed and recorded by him, there would not appear in his office, or anywhere else, a return or statement of the officer making the sale, that the law had been complied with in the respects aforesaid, and no general statement would appear, from the return of such officer, that the law had been complied with. Yet, the said act of 1882 and the sections 19 and 25 of said act, and of said chap. 31 of the Code of West Virginia, authorize the clerk of the county court to make a deed to the purchaser reciting that such sale was made in pursuance of the statute in such case made and provided, and to state in such deed that at said sale, "so commenced, continued and completed according to law," the certain person became the purchaser of the tract of land; such deed, being made without any evidence whatever of the facts therein set forth and without any provisions in the law for such evidence, although said deed should be made, not by the officer who made the sale, but by another distinct and separate officer having nothing to do with the same.

And said act, as already stated, further provides that no irregularity, error or mistake of the person making the sale, or the failure of any officer mentioned in said law to do or perform any act or duty required to be done for said sale should avoid such deed or such sale.

Your orator, therefore, is advised and now charges that a sale or deed made under the provisions of such law is void under the provisions of the first section of the fourteenth amendment of the Constitution of the United States and the provisions of the constitution of the State of West Virginia, as depriving your orator of his property without due process of law. And your orator charges
9 again, that the pretended sale and deed hereinbefore mentioned and referred to, was and is void as depriving your orator of his property without due process of law. And your orator charges that when the said deed, so made without the making of the report required by sec. 18 of the said act of 1882, chapter 130, and

without its being recorded, as required by said section, rendered said deed invalid and without effect and that said deed made under such circumstances did not pass to the defendants the title to said property.

Your orator further shows that the value of said tract of one hundred and twenty-five acres of land at the present time is at least two thousand and five hundred dollars; and that the land, when sold, was worth at least one thousand ($1,000.00) dollars. And that when it was sold for the sum of fifteen and $\frac{27}{100}$ dollars to the defendants it was sold for a grossly inadequate price and the said sale should be set aside for that reason, as well as for the reasons already set forth herein.

Your orator further shows that on the 21st day of February, 1899, the attorney and agent of your orator, by appointment, met the defendant, John B. Lemon, representing the defendants, at the town of Harrisville, in the said county of Ritchie, and there tendered to him the sum of one hundred and seventy-six and $\frac{50}{100}$ dollars to cover the amount of the said taxes paid by the said defendants in the purchase of said land and of all taxes since paid by them upon said land and the costs of all surveys, report and deed, as claimed by the said Lemon. That the said Lemon refused to receive the said money at that time, but your orator now shows that he is ready to pay into court, whenever required by the court, the said sum of money or such sum of money as may be ascertained to be proper to cover said taxes, interest and costs of survey. But your
10 orator further shows that at the time the said land was sold for taxes, there was a very large amount of valuable timber growing thereon, suitable and valuable for manufacture of timber, staves and other wood products, and that since the said defendants purchased said land at said pretended tax sale and, perhaps, since they obtained the said pretended deed from the clerk of the county court aforesaid, they have casually entered upon said land from time to time and cut thereon large quantities of timber and removed the same from said land.

Your orator shows that the defendants have never improved the said land or cultivated it, or enclosed it, and have never had any actual possession of said land such as is necessary to give title to by adverse possession. But have only, from time to time, casually entered upon said land, or portions thereof, for the purpose of cutting and removing timber therefrom.

In consideration whereof, and inasmuch as your orator is without remedy except in a court of equity, he prays that the said defendants may be made defendants to this bill, that the summons of your honorable court do issue against them as such, that they be severally required to answer the allegations of this bill as fully and particularly as if the same were here again repeated in the form of interrogatories and to make such answer under oath, that there be granted to your orator a decree declaring the said sale and deed as made without due process of law; and declaring the same to be null and void and a cloud upon the title of your orator to the said one hundred and twenty-five acres of land and setting aside the

same, and decreeing that the said defendants are without right, title or interest in said land; and that the said defendants, upon a final hearing of this case, be enjoined from in any way interfering with the possession of the plaintiff of the said tract of land and of
11 his rights therein. And that such other and general relief may be granted to your orator as to the court may seem meet and to equity appertains and, as in duty bound, he will ever pray, etc.

WILLIAM J. TURPIN,
By Counsel.

MERRICK & SMITH,
Solicitors for Complainant.

UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *ss:*

Before the undersigned personally appeared William J. Turpin who being duly sworn deposes and says that the facts set forth in the said bill are true so far as they purport to be of his own knowledge, and so far as they purport to be stated on information and belief he believes them to be true.

WILLIAM J. TURPIN.

Subscribed and sworn this 13th day of April, 1899, at Pittsburgh, in said district, before me.

WM. T. LINDSEY,
[SEAL.] *U. S. Com'r, W. D. Pa.*

UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *ss:*

At the city of Pittsburgh, in the county of Allegheny, and district aforesaid, this 13 day of April, in the year 1899, personally appeared before me William T. Lindsey, a United States commissioner for said district, the above-named William J. Turpin, and made oath that the facts set forth in the foregoing bill, so far as they purport to be stated of his own knowledge, are true; and so far as they purport to be stated on information and belief, he believes them to be true.

Given under my hand this 13th day of April, in the year
12 one thousand eight hundred and ninety-nine.

WM. T. LINDSEY,
[SEAL.] *U. S. Commissioner for the Western District of Pennsylvania.*

EXHIBIT No. 1 WITH BILL.

(Filed April 15, 1899.)

This deed, made this 30th day of April 1874, between Virginia S. Hall, executrix, and William H. Douglass, executor of the last will and testament of Smith C. Hall, both of the county of Ritchie and

State of West Virginia, of the first part, and William J. Turpin, of said county and State, of the second part, witnesseth: That for and in consideration of one dollar in hand paid by said William J. Turpin to the parties of the first part, the receipt whereof is hereby acknowledged, and the further consideration of an undivided interest of two hundred and twenty-five acres of land in a tract of nine hundred and twenty-five acres of land situated on Laurel run and branches of Dutchman's run in the county of Ritchie and State of West Virginia, which said undivided interest was derived by said William J. Turpin, by deed of the 18th day of February 1867, from Smith C. Hall and wife, the said parties of the first part do grant and convey unto the said party of the second part a certain tract or parcel of land lying and being situated in the said county of Ritchie on the waters of Dutchman's run, a tributary of the South fork of Hughes river, bounded as follows, to wit: Beginning at a sugar tree, thence N. 48° W. 27 poles to a buckeye; thence N. 24½° W. 8 poles to two buckeye pointers; thence N. 72° W. 38 poles to a maple; thence N. 4½° W. 56 poles to a gum; thence N. 41½° W. 36 poles to a sycamore standing by Dutch-
13 man's run; thence N. 54° W. 37 poles to a red oak on said run bank; thence N. 43° E. 6 poles to a linn, corner of a survey of 609 acres made for Frederick Lemmon; thence with one line of the same S. 65° W. 112 poles crossing said Dutchman's run to a dogwood, corner to a survey of 100 acres made for said Lemmon; thence with a line of the same S. 67° W. 62 poles to a stake in said line; thence S. 23° E. 184 poles to a stake; thence N. 65° E. 218 poles to the beginning, containing 225 acres more or less. The said 225 acres being part and parcel of a large tract of 925 acres of land, situated on Laurel run and branches of Dutchman's run in the county and State aforesaid, and patented on the 1st day of March 1859 by the Commonwealth of Virginia to John A. Lowther and conveyed by him to said Smith C. Hall, on the 17th of November, 1860. And the said Virginia S. Hall, for herself and as executrix as aforesaid, covenants that she will warrant generally, and said William H. Douglass, executor, covenants that he will warrant specially the property hereinbefore conveyed.

The said party of the second part to have and to hold unto himself, his heirs and assigns forever, the said tract of 225 acres of land.

It is understood that this conveyance and one bearing even date herewith, from said Turpin and his wife to the said first parties are to operate as a division between said Turpin and said first parties of the said tract of 925 acres, an undivded interest of 225 acres in which was heretofore conveyed by said Smith C. Hall to said Turpin by deed of 18th of February 1867.

Witness the following signatures and seals the day and date first above written.

VIRGINIA S. HALL, *Executrix.* [SEAL.]
WM. H. DOUGLASS, *Executor.* [SEAL.]

Name of the person who, by himself or by his tenant, has the freehold in possession of the land charged.	Residence of the owner of the tract of land.	Nature of the owner's estate, whether held in fee or for life.	Number of acres in each tract.		Name
			Acres.	Fractions.	nam land cour plac lies.
1.	2.	3.	4.	5.	
Tarpin, Wm. J.....	Ill., *Ritchie Co.*.....	In fee ...	125	...	Dutch

STATE OF WEST VI
Ritchie Count

I, W. R. Mese
true copy of so mu
1883, as the same a
Given under m
Teste:
[SEAL.]
(Int. rev. 10c.

Year 1883 *in Murphy District, of the County of Ritchie, with Amount of Taxes Thereon for the said Year, within the Second Assessment District of said County.*

f acres ract.	Name of the tract, if it has a name; local description of land, reference to water-courses, mountains, or other places on or near which it lies.	Distance and bearing from court-house.		Value of land per acre, including buildings.	The sum included in the value of each tract of land on account of buildings.	Total value of the land and buildings.	Amount of tax for State purposes at 25 cents on every $100 value thereof.	Amount of tax for free-school purposes at 10 cents on every $100 value thereof.	Total tax for State and State school purposes.	Explanations.	County levy.	District levy.		
Fractions.		Bearing from C. H.	Miles distant.							From whom, when, and how the owner derived the land, where that is known, with a note and explanation of any alteration made, showing why and upon what authority it was made.	Being 40 cts. on every $100 value thereof.	Being 50 cts. on every $100 value thereof for school purposes.	Being 40 cts. on every $100 value thereof for building purposes.	Being 50 cts. on every $100 value thereof for road purposes.
5.	6.	7.	8.	9.	10.	11.	12.	13.	14.	15.	16.	17.	18.	19.
...	Dutchman & Laurel run	S. W.	20	2 20	.....	275	.69	.28	.97	Virginia S. Hall.....	1 10	1 38	1 10	1 38

TE OF WEST VIRGINIA, } *To wit:*
Ritchie County, }

I, W. R. Meservie, clerk of the county court of Ritchie county, in the State aforesaid, do certify that the foregoing is a copy of so much of the land books as pertains to a tract of land charged in the name of William J. Turpin for the year 3, as the same appears of record in my office.

Given under my hand and seal of said court this 6th day of April, 1899.

Teste:

[SEAL.]

W. R. MESERVIE, *Clerk.*

(Int. rev. 10c. stamp, cancelled.)

EXHIBIT No. 3 WITH BILL.

(Filed April 15, 1899.)

Table of Tracts of Land for the Year 1884 *in Murphy District, of the County of Ritchie, with Amount of Taxes Thereon for the sa*

Name of the person who, by himself or by his tenant, has the freehold in possession of the land charged.	Residence of the owner of the tract of land.	Nature of the owner's estate, whether held in fee or for life.	Number of acres in each tract.		Name of the tract, if it has a name; local description of land, reference to water-courses, mountains, or other places on or near which it lies.	Distance and bearing from court-house.		Value of land per acre, including buildings.	The sum included in the value of each tract of land on account of buildings.	Total value of the land and buildings.
			Acres.	Fractions.		Bearing from C. H.	Miles distant.			
1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.
Turpin, Wm. J.....	Illinois.....	In fee...	125	.....	Dutchman & Laurel.....	S. W.	20	2 20	....	275

STATE OF WEST VIRGINIA, *Ritchie County,* } *To wit:*

I, W. R. Meservie, clerk of the county court of Ritchie county, in the State aforesaid, do
true copy of so much of the land books as pertains to a tract of land charged in the name of W
1884, as the same appears of record in my office.

Given under my hand and seal of said court this 6th day of April, 1899.

Teste:

[SEAL.]

(Int. rev. 10c. stamp, cancelled.)

EXHIBIT No. 3 WITH BILL.

(Filed April 15, 1899.)

in Murphy District, of the County of Ritchie, with Amount of Taxes Thereon for the said Year, within the Second Assessment District of said County.

Name of the tract, if it has a name; local description of land, reference to water-courses, mountains, or other places on or near which it lies.	Distance and bearing from court-house.		Value of land per acre, including buildings.	The sum included in the value of each tract of land on account of buildings.	Total value of the land and buildings.	Amount of tax for State purposes at 20 cents on every $100 value thereof.	Amount of tax for free-school purposes at 10 cents on every $100 value thereof.	Total tax for State and State school purposes.	EXPLANATIONS. From whom, when, and how the owner derived the land, where that is known, with a note and explanation of any alteration made, showing why and upon what authority it was made.	County levy.	District levy.		
	Bearing from C. H.	Miles distant.								Being 35 cts. on every $100 value thereof.	Being 50 cts. on every $100 value thereof for school purposes.	Being 40 cts. on every $100 value thereof for building purposes.	Being 50 cts. on every $100 value thereof for road purposes.
6.	7.	8.	9.	10.	11.	12.	13.	14.	15.	16.	17.	18.	19.
Dutchman & Laurel.....	S. W.	20	2 20	.....	275	.55	.28	.83	Virginia S. Hall.....	.97	1 38	1 10	1 38

ST VIRGINIA, } *To wit:*
County, }

Meservie, clerk of the county court of Ritchie county, in the State aforesaid, do certify that the foregoing is a so much of the land books as pertains to a tract of land charged in the name of William J. Turpin for the year ame appears of record in my office.
der my hand and seal of said court this 6th day of April, 1899.

.]
10c. stamp, cancelled.)

W. R. MESERVIE, *Clerk.*

14 STATE OF WEST VIRGINIA, } *To wit:*
County of Ritchie, }

I, R. S. Blair, a notary public in and for the county and State aforesaid, do certify that Virginia S. Hall, executrix, and for herself, and William H. Douglass, executor, whose names are signed to the foregoing writing, bearing date on the 30th day of April, 1874, this day personally appeared and acknowledged the same before me in my county aforesaid.

Given under my hand this 7th day of May 1874.

R. S. BLAIR,
Notary Public.

WEST VIRGINIA:

RITCHIE COUNTY CLERK'S OFFICE, *August 6th*, 1874.

The foregoing deed was this day admitted to record in said office in Deed Book No. 17 pages 214 & 215.

Teste:

G. W. AMOS, *Clerk.*

(See tables marked pages 15 and 16.)

EXHIBIT NO. 2 WITH BILL.

(Filed April 15, 1899.)

EXHIBIT No. 4 WITH BILL.

List of Real Estate in the County of Ritchie Delinquent for the Non-payment of Taxes Thereon for the Year 1883.

Name of person charged with taxes.	Estate held.	Quantity of land.	Description and location of land.	Distance and bearing from court house.	State tax for State purposes.	State tax for school purposes.	County tax for all purposes.	District taxes.			Why returned delinquent.
								Am't of tax for school purposes.	Am't of tax for building purposes.	Am't of tax for road purposes.	
Murphy district.											
Turpin, Wm. J.....	In fee..	125	Dutchman & Laurel run..	.....	.69	.28	1 10	1 38	1 10	1 38	No property found.

I, D. F. Haymond, sheriff of the county of Ritchie do swear that the foregoing list is, I verily believe, correct and just, and that I have received no part of the taxes for which the real estate therein mentioned is returned delinquent, and that I have used due diligence to find property, within my county liable to distress for the taxes, but have found none. D. F. HAYMOND, *Sheriff.*

Sworn to and subscribed before me this 2d day of June, 1884.

G. W. AMOS, *Clerk County Court of Ritchie Co., W. Va.*

STATE OF WEST VIRGINIA, *ss:*

I, G. W. Amos, clerk of the county court of Ritchie county in the State aforesaid, certify that the foregoing is a true copy of the sheriff's list of delinquent real estate for the year 1883, as the same is on file in my office.

Teste:

G. W. AMOS, *Clerk.*

STATE OF WEST VIRGINIA, *Ritchie County,* } *To wit:*

I, W. R. Meservie, clerk of the county court of Ritchie county, in the State aforesaid, do hereby certify that the foregoing is a true copy of so much of the record of delinquent real estate as pertains to a tract of land returned delinquent in the name of William J. Turpin for the non-payment of taxes thereon for the year 1883, as the same appears of record in my office in the Record of Delinquent Real Estate No. 1 page 34.

Given under my hand and seal of said court this 6th day of April, 1899.

[SEAL.] Teste:

W. R. MESERVIE, *Clerk.*

(Int. rev. 10c. stamp, cancelled.)

EXHIBIT No. 5 WITH BILL.

List of Real Estate in the County of Ritchie Delinquent for the Non-payment of Taxes Thereon for the Year 1884.

Name of person charged with taxes.	Estate held.	Quantity of land.	Description and location of land.	Distance and bearing from court-house.	State tax for State purposes.	State tax for school purposes.	County tax for all purposes.	District taxes.			Why returned delinquent.
								Dist. tax for school purposes unpaid.	District tax for building purposes unpaid.	District tax for road purposes unpaid.	
Murphy district.											
Turpin, William J...	In fee..	125	Dutchman & Laurel.....	.....	.55	.28	.97	1 38	1 10	1 38	No property found.

I, D. F. Haymond, late sheriff of the county of Ritchie do swear that the foregoing list is, I verily believe, correct and just; that I have received no part of the taxes for which the real estate therein mentioned is returned delinquent, and that I have used due diligence to find property within my county liable to distress for the said taxes but have found none.

D. F. HAYMOND, *Late Sheriff.*

Sworn to and subscribed before me this 28th day of May, 1885.

G. W. AMOS, *Notary Public for Ritchie County, West Va.*

STATE OF WEST VIRGINIA:

I, G. W. Amos, clerk of the county court of Ritchie county in the State aforesaid certify that the foregoing is a true copy of the sheriff's list of delinquent real estate for the year 1884, as the same appears on file in my office.

Teste:

G. W. AMOS, *Clerk.*

STATE OF WEST VIRGINIA, *Ritchie County,* } *To wit:*

I, W. R. Meservie, clerk of the county court of Ritchie county, in the State aforesaid, do hereby certify that the foregoing is a true copy of so much of the record of delinquent real estate as pertains to a tract of land returned delinquent in the name of William J. Turpin for the non-payment of taxes thereon for the year 1884, as the same appears of record in my office in the Record of Delinquent Real Estate No. 1 page 38.

Given under my hand and seal of said court this 6th day of April, 1899.

[SEAL.] Teste:

W. R. MESERVIE, *Clerk.*

(Int. rev. 10c. stamp, cancelled.)

EXHIBIT No. 6 WITH BILL.

(Filed April 15, 1899.)

List of Real Estate within the County of Ritchie Sold in the Month of January, 1896, for the Non-payment of Taxes Thereon for the Years 1883 and 1884 and Purchased by Individuals.

Name of person charged with taxes.	Quantity of land charged.	Estate held therein.	Local description of land charged.	Am't of taxes due thereon for State & State school purposes, including interest & damages for what sold.		Amount of county tax due thereon, including same.		Amount of district tax due thereon, including same.		Quantity of land sold.	Date of each sale.	Name of purchaser.	Am't of purchase money paid, including interest, damages, commissions, fee for receipts, and cost of advertising.	When redeemed.	Amount of redemption money.	Remarks.
				For the year 1883.	For the year 1884.	For the year 1883.	For the year 1884.	For the year 1883.	For the year 1884.							
Murphy district.													$		$ Cts.	
Turpin, Wm. J.	125	Fee	Dutchman & Laurel run.	1 18	91	1 33	1 06	4 56	4 22	125	Jan. 12, 1886	J. B. & A. W. Lemon.	15.27			

20 I, J. B. Hallam, sheriff of the county of Ritchie do swear that the above list contains a true account of all the real estate within my county which has been sold by me to individuals during the present year for non-payment of taxes thereon for the years 1883 and 1884, and that I am not directly or indirectly interested in the purchase of any of said real estate; so help me God.

J. B. HALLAM, *Sheriff.*

Sworn and subscribed to before me this 1st day of February, 1886.

G. W. AMOS,
Notary Public for Ritchie County, West Va.

STATE OF WEST VIRGINIA, *County of Ritchie,* } *To wit:*

I, G. W. Amos, clerk of the county court of Ritchie county certify that the foregoing list of real estate together with the certificate of oath attached thereto was within 30 days after the completion of said sale, to wit: on the 1st day of February, 1886, returned to me by J. B. Hallam sheriff of said county and filed in my office, and that I have within 20 days thereafter, to wit: on the 5th day of February 1886 recorded the same in a well-bound book and the same day to wit: on the 5th day of February 1886, transmitted the original list to the auditor.

Teste:

G. W. AMOS, *Clerk.*

STATE OF WEST VIRGINIA, *Ritchie County,* } *To wit:*

I, W. R. Meservie, clerk of the county court of Ritchie county, in the State aforesaid, do hereby certify that the foregoing is a true copy of so much of the record as pertains to a tract of land sold by the sheriff of Ritchie county in the month of January, 1886, in the name of Wm. J. Turpin for the non-payment of taxes thereon for
21 the years 1883 and 1884, as the same appears in my office in Record of Delinquent Land Tax on page 64.

Given under my hand and seal of said court this 6th day of April, 1899.

Teste:

[SEAL.] W. R. MESERVIE, *Clerk.*

(Int. rev. 10c. stamp cancelled.)

EXHIBIT NO. 7 WITH BILL.

(Filed April 15, 1899.)

This deed made this 3d day of February, eighteen hundred and eighty-seven by G. W. Amos clerk of the county court of the county of Ritchie, West Virginia, of the first part and J. B. Lemmon and A. W. Lemmon of the second part:

Whereas in pursuance of the statute in such case made and provided, J. B. Hallam, sheriff of the said county did in the month of

January in the year eighteen hundred and eighty-six, commenc the sale of the real estate charged with taxes in said county and r turned delinquent therein for the non-payment of the taxes s charged thereon; and

Whereas, at said sale so commenced continued and complete according to law, the said J. B. Lemmon and A. W. Lemmon be came the purchaser- of a tract of land charged with taxes in sai county as a tract of 125 acres in the name of Wm. J. Turpin for th years eighteen hundred and eighty-three and eighteen hundred an eighty-four, for the sum of $15.27 that being the taxes interest an commissions due thereon at the date of such sale and the costs o publication and fee for the receipt of purchase-money; and

Whereas, more than one year has elapsed since the time o
22 said sale and purchase as appears by the sheriff's receipt fo the purchase-money, and the said real estate not having beer redeemed as provided for by law; and

Whereas after the expiration of the said one year, to wit: on the 14th day of January, eighteen hundred and eighty-seven, the said J. B. Lemmon and A. W. Lemmon caused a report to be made to the clerk of the county court specifying the metes and bounds of the real estate so purchased and giving a description thereof sufficient to identify the same, as required by law,

Now, therefore this indenture witnesseth: That the party of the first part for and in consideration of the premises and in pursuance of the statute in such case made and provided, has granted, bargained, and sold and by these presents doth grant bargain sell and convey to the parties of the second part their heirs and assigns forever all the real estate so purahased as aforesaid situate in the county of Ritchie on Gutchman and Laurel run bounded and described as follows, to wit:

Beginning at a sugar tree thence N. 48 W. 27 poles to a buckeye; N. 24½ W. 8 poles to a buckeye; and pointers, N. 72 W. 38 poles to a maple; N. 4½ W. 56 poles to a gum; N. 41½ W. 36 poles to a sycamore; N. 54 W. 37 poles to —; N. 43 E. 6 poles to a gum corner of F. Lemmon; thence S. 65 W. 86½ poles to a stake; S. 23 E. 180½ poles to a stake; N. 65 E. 130½ poles to the beginning containing 125 acres, be the same more or less.

To have and to hold the said real estate with its premises and appurtenances unto the said J. B. Lemon and A. W. Lemon their heirs and assigns forever.

Witness the following signature and seal.

G. W. AMOS, [SEAL.]
Clerk of the County Court.

23 STATE OF WEST VIRGINIA, } *To wit:*
County of Ritchie, }

I, J. H. Lininger a notary of said county do certify that G. W. Amos, clerk of the county court whose name is signed to the foregoing writing, bearing date on the 3d day of February, 1887, has this day acknowledged the same before me in my said county.

Given under my hand this 3d day of February, 1887.

J. H. LININGER,
Notary Public.

STATE OF WEST VIRGINIA, *ss:*

I, G. W. Amos, clerk of the county court of said county, certify that the foregoing is a true copy of a deed from the clerk of the county court to J. B. Lemmon and A. W. Lemmon together with the certificate of acknowledgment thereto, duly admitted to record this 15th day of *D*ebruary, 1887.

Teste: G. W. AMOS, *Clerk.*

STATE OF WEST VIRGINIA, *Ritchie County,* } *To wit:*

I, W. R. Meservie, clerk of the county court of Ritchie county in the State aforesaid, do hereby certify that the foregoing is a true copy of a deed from the clerk of the county court of Ritchie county to J. B. & A. W. Lemmon for 125 acres of land as the same appears of record in my office in Deed Book No. 28, pages 110 & 111.

Given under my hand and the seal of said court this 6th day of April, 1899.

Teste:

[SEAL.] W. R. MESERVIE, *Clerk.*

(Int. rev. 10c. stamp, cancelled.)

Subpœna in Chancery.

24 UNITED STATES OF AMERICA, *District of West Virginia,* } *ss:*

The President of the United States of America to the marshal of the district of West Virginia, Greeting:

You are commanded to summon J. B. Lemon and A. W. Lemon, citizens of and residents in the State of West Virginia, if they be found in your district, to be and appear in the circuit court of the United States, for the district of West Virginia, aforesaid, at rules to be held in the clerk's office of said court, at Parkersburg, on the first Monday in June, next, to answer a certain bill in chancery now filed and exhibited in said court against them by William J. Turpin, a citizen of and resident in the State of Pennsylvania. Hereof you are not to fail under the penalty of the law thence ensuing. And have then and there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of April, A. D. 1899, and in the 123d year of the Independence of the United States of America.

Attest:

[SEAL.] L. B. DELLICKER, *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of June, 1899, otherwise the said bill may be taken *pro confesso.*

L. B. DELLICKER, *Clerk.*

(Return endorsed:)

Received subpœna April 19, 1899, and served the same on J. B. Lemon and A. W. Lemon by delivering to each of them in person an office copy of the within April 20, 1899.

J. K. THOMPSON,
U. S. Marshal.
G. STOUT, *Deputy.*

Marshal fees, $6.94.

25 *Demurrer.*

(Filed June 6, 1899.)

Circuit Court of the United States for the District of West Virginia.

WILLIAM J. TURPIN, Plaintiff,
vs.
J. B. LEMON ET AL., Defendants. } In Equity.

J. B. Lemon and A. W. Lemon, defendants, come and demur to the bill of complaint filed in this cause, and for cause of demurrer say that the said bill is not sufficient in law.

2nd. And for further cause of demurrer defendants say that the complainant's bill upon its face shows that the complainant is not entitled to be entertained in a court of equity upon the relief prayed for in its bill of complaint; because, no right of action has accrued to the complainant (as appears from the said bill) within ten years next prior to the institution of this suit.

And for other good and sufficient cause of demurrer apparent on complainant's said bill.

J. B. LEMON &
A. W. LEMON,
By McCLUER & FORRER, *Att'ys.*

I, J. G. McCluer, an att'y practicing in the United States circuit court for the district of West Virginia, do certify that in my opinion the foregoing demurrer is well founded in point of law.

J. G. McCLUER, *Att'y.*

The affidavit of defendant, required by the rules of Supreme Court of United States & the circuit court of the United States for the district of West Virginia is hereby waived.

C. D. MERRICK,
Att'y for Wm. J. Turpin.

26 *Bond for Costs.*

(Filed June 30, 1899.)

Know all men by these presents: that we, William J. Turpin and E. M. Gilkeson are held and firmly bound unto the United States of America, in the penal sum of three hundred dollars, for the pay-

ment well and truly to be made we bind ourselves our heirs and administrators, firmly by these presents.

Sealed with our seals, and dated this 22nd day of June, 1899.

The conditions of the above obligation are such that, whereas, William J. Turpin has instituted his suit in equity against J. B. Lemon and A. W. Lemon, in the circuit court of the United States for the district of West Virginia; and it has been suggested on the record that the said plaintiff is a non-resident of this State, and security for costs is required; now if the said William J. Turpin shall well and truly pay all costs that may be awarded the defendant; and all such fees as may become due to the officers of said court in said suit, then this obligation to be void—otherwise to remain in full force.

WILLIAM J. TURPIN. [L. S.]
E. M. GILKESON. [L. S.]

Approved and filed this 30th day of June, 1899.

L. B. DELLICKER, *Clerk.*

At a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg, in said district, on the 5th day of August, 1899, the following order was made and entered of record, to wit:

27 WILLIAM J. TURPIN *vs.* J. B. LEMON and A. W. LEMON. } In Equity.

This day came the plaintiff and defendants, by their counsel, and thereupon this cause was submitted to the court upon the demurrer of the defendants to the complainant's bill, to be heard upon briefs to be filed by the respective parties within twenty days from this time.

And at another day, to wit: on the 14th day of August, 1900, the following order was made and entered of record, to wit:

WILLIAM J. TURPIN *vs.* J. B. LEMON and A. W. LEMON. } In Equity.

The demurrer of the defendants to the complainant's bill, heretofore filed, having been heretofore argued by counsel, and submitted to the court, and the court having maturely considered the same feels constrained under the rulings of the Supreme Court of the United States, to hold that the act of 1882 of the West Virginia legislature is constitutional. It is, therefore, adjudged, ordered and decreed that the said demurrer be and the same is hereby sustained, and that the complainant's bill be dismissed, and that the defendants recover from the complainant their costs about their defenses herein in this behalf expended. And thereupon the complainant, by counsel, gave notice that the complainant desired an appeal from

this decree to the Supreme Court of the United States, and presente
and asked leave to file his petition for such appeal, and said petitio
having been considered by the court, it is ordered that said appe
be allowed and that a certified transcript of the record, plea
28 ings, exhibits and all proceedings herein be transmitted
the Supreme Court of the United States of America.

And it is further ordered that the bond on said appeal be fixe
at $300.00, as the bond for costs of said appeal, which shall be give
with good security before the judge of the court.

Petition for Appeal.

(Filed August 14, 1900.)

To the honorable judges of the circuit court of the United States for the district of West Virginia:

The petition of William J. Turpin, filed in a suit in equity in said court wherein said William J. Turpin was plaintiff and J. B. Lemon and A. W. Lemon were defendants.

Your petitioner respectfully shows that, in said suit, a final decree was entered by said court upon the 14th day of August, 1900, whereby the demurrer to the bill in said case was sustained and the said bill dismissed and that he is aggrieved by the entering of said decree and desires that an appeal shall be allowed from said decree to the Supreme Court of the United States.

Your petitioner shows that the controversy in said suit raised by the bill and demurrer thereto involved the constitutionality of certain laws of the State of West Virginia and involved the question as to whether said laws were contrary to the Constitution of the United States; and that the said decree, by sustaining said demurrer and dismissing said bill, decided upon the constitutionality of said laws of West Virginia and affirmed the same. And your petitioner shows that he is entitled to have allowed an appeal from said decree to the said Supreme Court of the United States, as shown in the assignment of errors herewith filed.

29 Your petitioner therefore prays that such appeal be allowed and that a transcript of the record, pleadings and proceedings had in said case be ordered to be made and transmitted to the said Supreme Court of the United States and, as in duty bound, he will ever pray, etc.

WM. J. TURPIN,
By MERRICK & SMITH,
His Solicitors.

Assignments of Error.

(Filed August 14, 1900.)

In the Circuit Court of the United States for the District of West Virginia.

WILLIAM J. TURPIN
vs.
J. B. LEMON and A. W. LEMON. } In Equity.

The assignment of errors with the petition of William J. Turpin for an appeal from the decree of said court, entered in said case on the 14th day of August, 1900, which decree sustained the demurrer to the bill in said case and dismissed said bill.

The said William J. Turpin assigns as error in said decree and as grounds for a review and reversal of said decree, the following:

First. The court erred in sustaining said demurrer.

Second. It erred in dismissing said bill.

Third. It erred in refusing to grant the relief prayed for by the complainant's bill.

Fourth. It erred in holding the acts of the legislature of West Virginia of 1882 (now found in chapter 31 of the Code of West Virginia) in regard to sales of lands for taxes in West Virginia,
30 as constitutional.

Fifth. It erred in holding said act constitutional and sustaining said demurrer because the statutes of West Virginia providing for sales for taxes, and under which the sale complained of in the complainant's bill was made, do not provide for due process of law, and is void under the first section of the fourteenth amendment to the Constitution of the United States.

Sixth. The court erred in sustaining said demurrer because the tax sale complained of in the bill, as evidenced by the report of the sheriff, shown by the exhibits filed with the bill, was not due process of law under said first section of the fourteenth amendment to the Constitution of the United States.

Seventh. The court erred in sustaining said demurrer because the said laws of West Virginia providing for tax sales did not afford to the complainant the equal protection of the laws, as guaranteed by the first section of the fourteenth amendment to the Constitution of the United States.

Eighth. The court erred in sustaining said demurrer because no report of survey of said land was made and placed of record before the making of said deed, as required by the statutes of West Virginia.

Ninth. The court erred in sustaining said demurrer because the tax deed in the bill mentioned is void because the description therein contained is not sufficient to locate the land.

For these and other reasons, apparent of record, the complainant

says that he is aggrieved by said decree of August 13, 1900, and that the same should be reqiewed and reversed.

WILLIAM J. TURPIN,
By MERRICK & SMITH,
His Solicitors.

31 *Appeal Bond.*

(Filed September 28, 1900.)

Know all men by these presents, that we, William J. Turpin, as principal, and Edwin M. Gilkeson, as surety, are held and firmly bound unto J. B. Lemon and A. W. Lemon in the full and just sum of three hundred dollars to be paid to the said J. B. Lemon and A. W. Lemon, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of September, in the year of our Lord one thousand nine hundred.

Whereas, lately at a circuit court of the United States for the district of West Virginia, in a suit depending in said court, between William J. Turpin, complainant, and J. B. Lemon and A. W. Lemon, defendants, a decree was rendered against the said William J. Turpin, and the said William J. Turpin having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said J. B. Lemon and A. W. Lemon, citing and admonishing them to be and appear at a United States Supreme Court to be holden at Washington, D. C., on the day in the said citation mentioned:

Now, the condition of the above obligation is such, that if the said William J. Turpin shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. J. TURPIN, [SEAL.]
By C. D. MERRICK,
His Attorney-in-fact.
E. M. GILKESON. [SEAL.]

Sealed and delivered in presence of—
L. V. G. MORRIS.

Approved by—
J. J. JACKSON,
U. S. Dist. Judge.

Sept. 28, 1900.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. B. Lemon and A. W. Lemon, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court, to be holden at Washington, D. C., on the 28th day of October next, pursuant to an appeal from a decree of the circuit court of the United States for the district of West Virginia, in your favor passed in a cause in said court wherein William J. Turpin is complainant, and you are defendants to show cause, if any there be, why the decree rendered against the said William J. Turpin in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States this 28th day of September, in the year of our Lord one thousand nine hundred.

{Seal Circuit Court United States, District West Virginia, Parkersburg, West Va.}

J. J. JACKSON,
U. S. Dist. Judge.

Sept. 29, 1900.

Service of within citation accepted this 29th day of September, 1900.

J. B. LEMON AND A. W. LEMON,
By J. G. McCLUER,
Attorney for Defendants.

33 UNITED STATES OF AMERICA, *District of West Virginia,* } *ss:*

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, hereby certify that the foregoing is a true and complete transcript of the record and proceedings of said court in the equity cause of William J. Turpin *vs.* J. B. Lemon and A. W. Lemon, lately pending therein, as the same appears among the records of my said office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at Parkersburg, in said district, this 18th day of October, A. D., 1900.

{Seal Circuit Court United States, District West Virginia, Parkersburg, West Va.}

L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va.

Endorsed on cover: File No. 17,956. West Virginia C. C. U. S. Term No. 188. William J. Turpin, appellant, *vs.* J. B. Lemon and A. W. Lemon. Filed November 1, 1900.

Office Supreme Court U.S.
FILED
NOV 19 1901
JAMES H. MCKENNEY,
Clerk

No. 188.

Sup. Ct. Morrison Jr. Appt.

Rec'd Nov. 19, 1901.

Supreme Court of the United States.

October Term, 1901.

No. 188.

WILLIAM L. TURPIN, APPELLANT,

vs.

J. H. LEMON AND A. M. LEMON, APPELLEES.

Appealed from the Circuit Court of the United States for the District of West Virginia.

STATEMENT AND BRIEF FOR APPELLANT BY C. B. MORRISON.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 188.

WILLIAM J. TURPIN, APPELLANT,

vs.

J. B. LEMON AND A. W. LEMON, APPELLEES.

Appealed from the Circuit Court of the United States for the District of West Virginia.

STATEMENT AND BRIEF FOR APPELLANT BY C. D. MERRICK.

STATEMENT OF CASE.

This was a suit in equity brought by William J. Turpin on the 15th day of April, 1899, to set aside a tax sale and deed for land which had been assessed for taxes in the name of William J. Turpin for the years 1883 and

1884, in the County of Ritchie and State of West Virginia, and which was sold for said taxes by the Sheriff of said County on the 12th day of January, 1886, to the said J. B. and A. W. Lemon. The deed made under said sale was made by G. W. Amos, Clerk of the County Court of Ritchie County, to J. B. and A. W. Lemon on the 3rd day of February, 1887.

The bill in this case was filed alleging that the complainant, while formerly a resident of Ritchie County, had been absent from the State of West Virginia for many years and has been in poor health and, much of the time since the tax sale complained of, had been unfit to attend to business or look after the same. This statement was made explaining the seeming delay in bringing the suit now before the Court.

The bill alleged, also, that the defendants had never had any actual possession of the land in dispute, although they did casually enter upon the land and cut, from time to time, some timber thereon. The bill charges that the defendants have not been and are not in possession of the land.

The plaintiff seeks to have said tax sale and deed set aside as wholly null and void and as passing no title to the defendants, charging that the Acts of the Legislature of the State of West Virginia, as contained in the Acts of 1882 and as now incorporated in the Code of West Virginia of 1891, do not provide, with regard to the sale of land returned delinquent for taxes and the making of deeds under such sales, what is due process of law as required by the constitution of the State of West Virginia and by the first section of the Fourteenth Amendment to the Constitution of the United States, and also that said Act denies to the complainant the equal protection of the laws.

The statute under which the sale was made is attacked as an entirety, that is as a system; and as such it is alleged that it does not constitute due process of law, and that while the proceeding may have been conducted under this

statute yet the system provided is arbitrary and uncertain in its character and deprives persons of their property without a hearing and without remedy and this by the express declarations of the statute. By one portion of the statute a certain definite procedure is provided for as follows:

1. The Auditor of State shall certify to the Sheriff a list of delinquent lands for sale.

2. The Sheriff shall publish and post a notice of the sale.

3. The sale shall take place at the front door of the Court House.

4. The sale shall be made at a certain time, within certain limits fixed by the statute.

5. If the sale is not completed on the day set, there shall be an adjournment from day to day until completed.

6. The sale shall be made between the hours of 10 in the morning and 4 in the afternoon.

7. The sale shall be at public auction.

8. The person who will take the least number of acres and pay the taxes shall become the purchaser.

9. The law does not provide for any personal notice to the owner. The proceeding is *ex parte*.

10. Therefore a strict compliance with the foregoing requirements in making the sale are in a sense jurisdictional.

But the statute does not require the sheriff to show in his return of sale that he has complied with these requirements, or any of them, or even to state in general terms that the sales have been in accordance with the statute. The record as thus made up cannot possibly show *how* the Sheriff has performed his duty in advertising or making the sale in any respect.

It cannot show whether the land has been certified for sale; whether notice of sale has been posted and published; whether the sale was made on the day required by law; or within the hours required; or at the place required; or whether made at public auction; or to the person who

would take the least amount of land and pay the taxes; nor does the law provide any general statement in the return of the sheriff that the sale has been advertised or made in accordance with the statute in question.

The provisions of the statute under which the sale was made are found in the Acts of the Legislature of 1882 chapter 130 and Acts of 1883, chapter 57; sections 4, 6, 7, 8, 9, 10, 12, 13 and 14 and said sections are as follows:

"4. On or before the first day of November, in the year one thousand eight hundred and eighty-three, and in every second year thereafter, the auditor shall cause to be delivered to the sheriff or collector of the taxes for every county two lists of the real estate therein, which, at the time said lists are made out, shall have been returned delinquent for the non-payment of the taxes thereon for any previous year and not previously sold therefor, and on which the taxes and interest, or any part thereof, shall remain then unpaid and not released or otherwise discharged, with a statement of the several amounts due for state and state school taxes; county taxes for all purposes; school district and independent school district taxes; other district taxes for all purposes; and municipal corporation taxes for all purposes, on each tract or lot for each year, with interest on each amount from the twentieth day of January in the year succeeding that in which such taxes were levied, until the first day of November in the year such lists are delivered as aforesaid to the sheriff or collector, at the rate of twelve per centum per annum added thereto. But if the real estate has been sold for the non-payment of taxes, the same shall not be charged with, or again sold on account of any tax for any year previous to that for the taxes of which the sale was made; except, that if for any cause a previous sale of real estate purchased by or in behalf of the state, has been or shall be set aside by any court, and the taxes for which it was or shall be sold, have not been paid, the auditor shall include in such lists all such real estate, and the same shall be sold for the taxes and interest due thereon for the years for which it was previously sold, in like manner and with like effect as the other real estate mentioned in said lists.

"6. Within ten days after receiving such lists, the sheriff or collector shall make out and cause to be pub-

lished, once in each week for four successive weeks, in some newspaper published in the county, prior to the day of sale, an abstract of such list, in form or effect as follows:

Sale of Real Estate for Taxes.

"Notice is hereby given that the following described tracts or lots of land in the county of ————, which are delinquent for non-payment of taxes for the year (or years) 18—, will be offered for sale by the undersigned sheriff (or collector) at public auction at the front door of the court house of said county, between the hours of ten in the morning and four in the afternoon on the——day of———— 18—. Each tract or lot, or so much thereof as shall be necessary, will be sold for so much cash as is sufficient to satisfy the amount due thereon, as set forth in the following table:

Name of person charged with taxes.	Quantity of land.	Local description.	Total amount of taxes, interest, costs of publication and commissions, being amt. necessary to redeem before the sale.	Total amount of taxes, interest, costs of publication, commissions, and fee for receipt.

"Any of the aforesaid tracts or lots may be redeemed by the payment to the undersigned, sheriff (or collector), before sale, of the amount due thereon.

"Given under my hand this —— day of ———, 18—.

"A——B———,

"Sheriff (or Collector)."

"The real estate mentioned in such list, or so much thereof as shall be sufficient to satisfy the taxes, with the interest on the same, and a commission of five per cent. on

the whole amount to sheriff or collector, shall be sold at public auction, between the hours of ten in the morning and four in the afternoon, on the first day of the next November or December term of the circuit or county court of the said county, which ever may be held first after the posting of said list and the publication of said notice as herein required; or if no term of either court be held in said county in November or December, then on the second Monday in December next thereafter, unless the said taxes, interest and commissions are sooner paid to the sheriff or collector, or into the treasury of the state. He shall also as soon as such abstract is published the first time in a newspaper, as herein required, post one of the copies of the list received from the auditor, on the front door of the court house, with a like notice appended thereto. If the lists herein named be not received by the sheriff in time to publish such notice and make such sale in the month of November or December, as herein provided for, said sale shall be commenced on the first day of a circuit or county court for such county, which ever may be held first in the succeeding year next after the publication of such notice of sale. The cost of publishing such notice in a newspaper, as hereinbefore required, shall be equally distributed among the several tracts or lots of land therein named, and the amount thereby apportioned to each tract or lot shall be added to the sum for which such tract is sold, and the same shall be paid from the proceeds thereof by the sheriff or collector making the sale, except that when any tract sold at such sale is purchased by the state, the sum due for such publication shall be paid out of the school fund in the treasury of the state upon the certificate of the auditor of the amount so due. But if any one or more of the tracts or lots of land are, in any respect, not printed in such newspaper as the same is stated and set out in the abstract furnished by the sheriff for publication, no compensation shall be paid for the publication of such tract, and no sale of any such real estate as is sold by such sheriff, as aforesaid, or deed therefor to the purchaser thereof, shall be, in any way or manner affected by reason of any mistake in the publication, or posting, of such list or notice, or of the notice mentioned in section forty nine of this chapter, in any newspaper in which the same is published, or by the sheriff or collector posting the same, as to the name of the owner, the quantity or location thereof, the amount for which it is to be sold, the year or years for which it is delinquent, or otherwise. If there

be no newspaper published in the county, or if no newspaper therein will publish said list and notice for the compensation provided by law, then the sheriff shall set up one of the lists so received by him as aforesaid at the front door of the court house of his county, with the notice of sale therein provided for attached thereto, at least four weeks before the time stated in such notice, at which such sale will commence, and shall post a written or printed copy of such notice (but not of such delinquent list) at some public place in each magisterial district of his county, at least twenty days before said sale. In such case the notice shall state that the delinquent list has been posted at the door of the court house of the county. Such taxes, interest, costs of publication and commissions, may be paid to the sheriff or collector at any time before such sale, and he shall make a list of the real estate within the county, the taxes on which were paid to him as aforesaid, and return the same to the auditor. After such sale as in the succeeding section is mentioned, if any such real estate be not sold as therein required, it shall be presumed that such taxes, interest and commissions were paid, in the absence of proof to the contrary.

"7. If the said taxes, interest, costs of publication and commissions be not previously paid, the sheriff or collector shall proceed to make said sale, and if the same be not completed on the day named in the notice thereof, it shall be continued from day to day (Sundays excepted), between the hours aforesaid until it shall be completed. When it shall appear to any sheriff or collector that any real estate inserted in the lists delivered to him as aforesaid, ought not to be sold for the amount stated therein, he shall suspend the sale thereof and report his reasons therefor to the auditor, who shall thereupon make such order in relation thereto as may be just. If the real estate, the sale of which is suspended as aforesaid, ought to be sold for the same or a greater or less amount, it shall be inserted in the next list delivered to the sheriff, charged with the proper amount of taxes, interest and commissions due thereon, and sold therefor in like manner as the other real estate contained in said list.

"8. The sale shall be of each tract of land, or city, village or town lot, or of such separate quantities or parts of such tract, or of such undivided interest in such lot as

shall be sufficient to satisfy the whole of the taxes, interest and commissions mentioned in the fourth section of this chapter, remaining unpaid, and the proceeds of such sales shall be accounted for and disposed of as follows: That portion thereof which was assessed for state and state school purposes, or for any other state purpose, with the interest theron, shall be paid into the state treasury within sixty days after said sales are closed, and added to the irreducible school fund; and that portion thereof assessed for county, school district, independent school district, and other district purposes, shall be accounted for and paid over by the sheriff or collector as other county, school district, independent school district and other district taxes are accounted for and paid by him, and the part thereof assessed for municipal purposes shall be accounted for and paid over to such officer or person as the council of the city, village or town to which they belong shall direct.

"9. No sheriff, deputy sheriff, collector or other officer, who shall return any real estate delinquent for the non-payment of the taxes thereon, or who shall receive a list thereof under the provisions of the fourth section of this chapter, or who shall sell by himself, his deputy or agent, or who shall be the deputy of any officer making such sale, shall directly or indirectly purchase any real estate so sold, or be in any way directly or indirectly interested with any other person in such purchase. Every person violating this section shall forfeit one hundred dollars for each offense, and the sale shall be absolutely void, and the title to the real estate sold shall remain in the person in whose name the same was sold.

Receipt for Purchase Money—Return of Sales.

"10. The sheriff or collector on receiving from any purchaser the amount of purchase money shall grant to him a receipt for the same to the following effect:

"Memorandum of real estate sold in the county of ——— on this ——— day of ——— eighteen ———, for the non-payment of taxes charged thereon, in the said county for the year (or years) eighteen———:

Name of person charged with taxes.		
	Quantity of land charged in the county, in all the district therein.	
	In what district or districts charged with taxes.	
	Estate held therein.	
	For the year ...	Amount of tax due thereon for state and state school purposes, including interest and commissions.
	For the year ...	
	For the year ...	Amount of county taxes due thereon including same.
	For the year ...	
	For the year ...	Amount of school dist. and independent school dist. taxes due thereon, including same.
	For the year ...	
	For the year ...	Amount of other district taxes due thereon, including same.
	For the year ...	
	For the year ...	Amount of municipal taxes due thereon, including same.
	For the year ...	
		Quantity of land sold.
		Name of purchaser.
		Whole amount paid for purchase money; fee for receipt and costs of publication.

"Received of ——— the above sum of ———, it being the whole amount paid by him for the purchase money of the real estate mentioned in this memorandum, including costs of publication and the fee for this receipt.

A— B——— Sheriff (or Collector.)"

List of Sales to be Returned by Sheriff, Etc.

"12. The sheriff or collector who made the sale, shall forthwith make out a list of sales so made, with a caption thereto in form or effect as follows:

"List of real estate sold in the county of ——— in the month (or months, as the case may be,) of ——— eighteen ——, for the non-payment of the taxes charged thereon, in the said county, for the year (or years, as the case may be), eighteen———." Underneath shall be the several columns mentioned in the tenth section of this chapter, with a like caption to each column.

Affidavit to be Appended to List—Recordation of Same.

"13. There shall be appended to such list an affidavit in form or effect as follows:

"I, A—B——, sheriff (or collector or deputy for C—D—, sheriff or collector), of the county of ——, do swear that the above list contains a true account of all the real estate within my county which has been sold by me during the present year, for the non-payment of taxes thereon for the year ———, and that I am not directly or indirectly interested in the purchase of any of said real estate. So help me God." Which oath shall be subscribed and taken before some person authorized to administer oaths.

"14. The list, with the certificate of oath attached shall within thirty days after the completion of such sale, be returned to the clerk of the county court, who shall within twenty days thereafter, record the same in a well bound book, and transmit the original to the auditor. And if any sheriff or other officer whose duty it is to make out and return such list, shall fail or refuse to do so as herein required, he shall be guilty of a misdemeanor and fined not less than fifty nor more than five hundred dollars; and he and his securities in his official bond shall be liable in an action on said bond for all such damages as may be sustained by any person by reason of such failure; and such sheriff or other officer may, upon the petition of any person interested, be compelled by mandamus to make out and return such list, and the proceedings thereon shall be at his costs."

By an examination of said sections it will be seen that a specific method of procedure is laid down, the following of which certainly is *jurisdictional* so far as anything in administrative process can be considered *jurisdictional.* Yet the statute also provides a form of sale list and return by the Sheriff which enables the Sheriff to *violate every one of the requirements of the statute* in advertising and making the sale and notwithstanding such violation *make* a truthful return which will comply with all that is required in the form of such return. So that the Sheriff could violate any or all of said requirements, make a truthful return in accordance with the statute, and the record still fail to

show any irregularity, omission or mistake in advertising or selling.

The method of having a survey and report thereof made is provided by section 18 of Acts of 1882, chap. 130, as follows:

"18. The purchaser of an entire tract of land so sold and not redeemed within the said one year, his heirs or assigns, shall, at his or their expense, have a report or a survey, at his option, made, showing and specifying the metes and bounds of such tract, as far as the same can be ascertained. If a survey be made, a plat thereof as provided in the next preceding section shall be returned to the clerk of the county court, and be by him recorded as provided in said section. If a report, only be made, it shall be to said clerk and shall, in addition to what is hereinbefore prescribed, give such description of the tract sold, as will identify the same, and the clerk shall record such report in the deed book as provided in said next preceding section. The survey or report made in pursuance of this and the next preceding section, shall be made by the surveyor of the county in which the sale is made, or if he be interested, or if for any reason it be improper for him to act, or if there be no such surveyor, then by some competent and proper surveyor appointed by the county court of the county in which the real estate was sold, for the purpose, who shall take an oath that he will faithfully discharge the duties of his appointment to the best of his skill and judgment; which oath may be taken in open court, or before any person authorized by law to administer oaths, and a certificate of his having so taken said oath shall be filed with the clerk of the county court. If the purchase be of an entire city, village or town lot, no survey or report thereof need be made."

The method of obtaining a deed is provided by section 19 of Acts of 1882, chap. 130, as follows:

Deed to Purchaser, etc.; Form Of.

"19. After the expiration of the said one year, and the making of the survey or report mentioned in the seventeenth and eighteenth sections of this chapter, where the same is required, the purchaser of any real estate so sold and not redeemed as aforesaid, may obtain from the clerk of the county court of the county in which such sale

was made, a deed of conveyance for the same. Such deed shall be made to the purchaser himself, or to such person as he may direct, either in writing acknowledged as a deed is required to be acknowledged, or by his joining therein: and if the purchaser has died, the same shall be made to his heir at law or devisee, or if he assigned his purchase during his lifetime, by a writing such as is hereinbefore mentioned, it shall be made to such assignee, or to his heir at law or devisee. Such deed may be in form or effect as follows:

* * * * * * * * * *

"If the purchase was of a city, town or village lot, or a part thereof, or an undivided interest therein, the above form must be varied according to the facts."

The form provided by the statute has been followed precisely in the deed in question in this case, found on page 13 of printed record.

It will be noticed that the form used states in the second paragraph that the sale was commenced "pursuant to the statute in such case made and provided" and the third paragraph recites "Whereas at said sale so commenced, continued and completed according to law the said J. B. Lemmon and A. W. Lemmon became the purchasers," etc.

The tax deed is made by the Clerk of the County Court *who has nothing to do with making the sale and who can have no personal or official knowledge* as to the sale except that derived from the return of the Sheriff which does not say that the sale is commenced, continued or completed according to law, much less state the *manner* in which the law has been complied with. A solemn and formal statement is made in the deed by a person who has *absolutely no knowledge* of the matter, basing the statement on a Sheriff's return, which gives *absolutely no information* as to whether the law has been complied with or not.

The title conveyed by such deed and the effect of it are provided by sections 25 and 29 of chapter 130 of Acts of 1882 as follows:

What Title Conveyed by Deed When Made.

"25. When the purchaser of any real estate so sold, and not redeemed as aforesaid, his assignee, or heirs or devisees, shall have obtained a deed therefor according to the provisions of this chapter and caused the same to be admitted to record in the office of the clerk of the county court of any county in which such real estate or any part thereof may be, such right, title and interest in and to said real estate, as was vested in the person or persons charged with the taxes thereon for which it was sold, at the commencement of, or at any time during the year or years for which said taxes were assessed, and all such right, title and interest therein of any other person or persons having title thereto who have not in his or their own name been charged on the land books of the proper county or assessment district with the taxes chargeable on such real estate for the year or years for the taxes of which the same was sold, and have actually paid the same as required by law, shall be transferred to and vested in the grantee in such deed, notwithstanding any irregularity in the proceedings under which the same was sold, not herein provided for, unless such irregularity appear on the face of such proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was so sold, and when and for what year or years it was sold, or the name of the purchaser thereof; and not then, unless it be clearly proved to the court or jury trying the case, that but for such irregularity the former owner of such real estate would have redeemed the same under the provisions of this chapter. When there are more than one such owner of such real estate, or person charged with taxes thereon, who are co-tenants thereof, or otherwise jointly interested therein, if the same be charged with taxes to one of them alone, or one, or more of them and others, without naming the others, such right, title, interest and estate as was vested in all, or any, or either of them, shall pass to and be vested in the grantee in such deed, and where the real estate so sold is charged to the heirs, or to the devisees of a decedent, without giving their names, or to the estate of a decedent, or to a deceased person in his or her own name, such right, title, interest and estate as was vested in the decedent at the time of his or her death in such real estate, shall pass to and be vested in the grantee in such

deed. If more than one tract of land be charged as one, or the quantity thereof or the residence of the party charged with taxes thereon, or the location of the real estate sold, or the district in which it is charged with taxes, be misstated, all such right, title, interest and estate therein as is hereinbefore mentioned, shall nevertheless pass to and be vested in the grantee in such deed. No irregularity, mistake or overcharge as to the amount of taxes, interest and commissions due on any such real estate, and for which it is sold, nor any payment of a part of such taxes, interest or commissions, shall invalidate or affect the sale of such real estate, except as to such part of said real estate proportioned to the whole thereof, as such part of said taxes, interest and commissions, so improperly charged against such real estate, and for which it was sold, bears to the whole sum for which it was sold. If the real estate sold as aforesaid be charged to a trustee by name, either with or without the addition of "trustee" or if there are more than one trustee, and it be charged to one of them, or to one or more of them, and others, without naming the others, and with or without the addition of trustee, or trustees; or if it be charged to the trustees, of ——— ———, without naming any of the trustees, all the right, title, interest and estate vested in such trustees, and each of them, and vested in each and every person for whom, or for whose use the said real estate was held in trust by such trustee or trustees, shall pass to and be vested in the grantee in such deed. If at the time of such sale the real estate sold be under a mortgage or deed of trust, or there be any other lien or encumbrance thereon, and the mortagee, trustee, *cestui que trust* or person holding any such lien or encumbrance shall fail to redeem the same within the time prescribed by the fifteenth section of this chapter, then all the right, title and interest of such mortagee, trustee, *cestui que trust*, and of the person or persons holding any such lien or incumbrance on the real estate so sold and not redeemed, shall pass to and be vested in the grantee in such deed; and his title to the premises shall in no way be affected or impaired by any such mortgage, deed of trust, lien or encumbrance. And no irregularity, error or mistake in the delinquent list or the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the county court, or in the affidavit thereto, or in the recordation of such list or affidavit, or as to the manner of laying off any real estate so sold, or in the

plat, description, or report thereof made by the surveyor or other person, shall after the deed is made, invalidate or affect the sale or deed. And if the deed be valid under the sale for the state taxes, it shall not be affected or impaired by any irregularity in the proceedings or sale for the county, district or other taxes, or any of them. If the sale be made for the taxes for two or more years, and be valid as to one or more of such years, but invalid as to the other year or years, and a deed or deeds therefor be made to the purchaser, or to his heirs, devisees or assigns, such sale or deed, for the year or years for the taxes of which the sale is valid, shall not in any way be affected or impaired by reason of the sale of the real estate conveyed by such deed being invalid for any other year or years for which it was so sold. And no deed for any real estate sold under the provisions of this chapter shall be vacated or set aside in whole or in part by reason of any mistake or irregularity in the proceedings of record as aforesaid, unless and until the person entitled to have the same so set aside shall pay or tender to the purchaser, or his heirs, devisees or assignee, or the person holding under him, or some one or more of them, the purchase money paid for the said real estate at the time of the sale thereof, and all the taxes since paid thereon for any year or years for which such person so claiming, or those under whom he claims have not paid taxes thereon, and the costs of the survey or report made as hereinbefore required, with interest on each sum from the date of the payment thereof to the time of such payment by the person so claiming. When any such sale is set aside in part, the court shall cause a partition of the real estate conveyed by the deed, if the same be necessary, between the person so claiming real estate and the holder thereof under such sale and deed, according to their respective interests therein. And when any such sale or deed is set aside in whole or in part by reason of any mistake or irregularity in the proceedings of record in the office of the clerk of the county court, the officer whose misconduct, neglect, mistake or default caused the same to be set aside, and his sureties in his official bond (if he has given such bond), shall be liable in an action on such bond, or in an action of trespass on the case, to any party injured thereby for all such damages as he may sustain by reason of the setting aside of such sale and deed, or either. But no sale or deed of any such real estate under the provisions of this chapter shall be set aside,

or in any manner affected by reason of the failure of any officer mentioned in this chapter to do or perform any act or duty herein required to be done or performed by him after such sale is made, or by the illegal or defective performance, or attempt at the performance, of any such act or duty after such sale, or by reason of the conveyance by the deed hereinbefore mentioned and prescribed, of a less quantity of real estate than that mentioned in the list of sales made out and returned as provided in the twelfth, thirteenth and fourteenth sections of this chapter, if the real estate so conveyed by such deed be, in fact, the same which was sold as delinquent."

"29. In all cases in which a question shall arise as to any such sale or deed, or the effect thereof, such deed shall be *prima facie* evidence against the owner or owners, legal or equitable, of the real estate at the time it was sold, his or their heirs and assigns, and all other persons who might have redeemed the same within said one year, as hereinbefore provided, and conclusive evidence against all other persons, that the person named in the deed as clerk of the county court was such, that the sheriff or other officer who made the sale was such sheriff or officer as stated in such deed, that the material facts therein recited are true, that such estate as is mentioned in the twenty-fifth section of this chapter vested in the grantee in the deed."

Section 25 provides that when a deed has been made pursuant to the sections quoted the title to the land shall be transfered and vested in the purchaser "notwithstanding any irregularity in the proceedings under which the same was sold not herein provided for *unless such irregularity appear on the face of such proceedings of record in the office of the Clerk of the County Court*, and be such as materially to prejudice and mislead the owner etc."

We have already seen from the sections referred to giving the return of the Sheriff that by no possibility could an irregularity or omission in the proceedings appear of record in the Clerk's office or elsewhere. The *manner* of advertising or selling can no where appear of record. The law provides *verbatim et literatim* a return for the sheriff which does not say in any particular whether or how he gave notice of sale, or when (that is in the sense

of the statute,) or where or whether at public auction, or whether to the highest bidder, the sale was made, and does not even require the general statement that the sale was advertised and made according to law. The law is so framed that *no* irregularity in its execution could by any possibility appear of record and it is further provided that the title shall vest in such purchaser *notwithstanding any irregularities* in the proceedings unless such irregularity appear on the face of such proceedings of record.

Under these conditions the mere fact that a *sheriff* returns that on a certain date he made a sale is by the law made *conclusive* in passing title.

Section 29 made the deed *prima facie* evidence of the material facts recited in the deed; but this section might well have been dispensed with after Section 25 was enacted for Section 25 goes farther than to make some deed or other paper *prima facie* evidence. It is conclusive as to everything relating to the sale because irregularities relating to the sale cannot appear of record.

These provisions of the law concealing from the public gaze the manner of executing the law, permitting each sheriff to violate the law in the form and to the extent best pleasing to himself, and requiring no return from him, providing for a deed containing a statement by an officer having no knowledge, personal or official, of the matter, that the law had been complied with, providing that no irregularity can appear of record, and that unless it does appear of record the title will pass; thus making the proceeding conclusive even before a tax deed is made; the bill charges do not furnish *due process* of law; and that the statute furnishing such a system is void as contrary to the Fourteenth Amendment of the Constitution of the United States. Pages 4 and 5 of record.

Nor has the sheriff, if it could be done, supplied what was lacking in the statute. The bill charges, page 3 of record, that it nowhere appears that the land had been certified to him for sale, or that the sheriff had published or

posted the notice required, or that the sale was made at a time he would be authorized to make such sale; or that the sale was at a place at which the sheriff was authorized to make it; or that it was at a public sale, or that it was sold to a person who would take the least number of acres and pay the taxes thereon; or that the sheriff had complied generally with the statute in making such sale.

The bill charges that the deed made was void for uncertainty in the description of the land conveyed. Page 2 of record. The bill further charges that the survey and report required by the statute to be made prior to the making of the deed was not made and recorded as required by the statute, (page 3 of record) which the bill charges rendered the deed void. The bill further charges that the action of the sheriff in making said sale did not constitute due process of law, and was void.

On the 6th day of June, 1899, the defendants filed their demurrer to the bill (page 16) and on the 14th day of August, 1900, the court rendered its decision, reciting that it "feels constrained under the rulings of the Supreme Court of the United States to hold that the Act of 1882 of the West Virginia Legislature is constitutional." It therefore sustained said demurrer and dismissed the bill. (Page 17.) At the same time with the entering of said decree the complainant filed his petition for an appeal to this court, which appeal was allowed. Page 18.

SPECIFICATIONS OF ERROR.

The appellant assigns errors in said decree as follows:

First. The Court erred in sustaining said demurrer.

Second: It erred in dismissing the bill.

Third: It erred in refusing to grant the relief prayed for by the complainant's bill.

Fourth: It erred in holding the Acts of the Legislature of West Virginia of 1882 in regard to sales of land for taxes constitutional.

Fifth: It erred in holding said act constitutional and sustaining said demurrer, because said act does not provide for due process of law, and is void under the first section of the Fourteenth Amendment to the Constitution of the United States.

Sixth: The court erred in sustaining said demurrer because the tax sale complained of was not due process of law under said first section of the Fourteenth Amendment to the Constitution of the United States.

Seventh: The Court erred in sustaining said demurrer because the said laws of West Virginia providing for tax sales did not afford to the complainant the equal protection of the laws as guaranteed by the first section of the Fourteenth Amendment of the Constitution of the United States.

Eighth: The Court erred in sustaining said demurrer because no report of survey of said land was made and placed of record before the making of said deed.

Ninth: The Court erred in sustaining said demurrer because the tax deed in the bill mentioned is void for uncertainty in the description of the land.

The assignment of errors will be found on page 19 of record.

ARGUMENT.

Reference is made in the decree appealed from to the rulings of this Court and the lower Court in entering the decree recited that it "feels constrained under said rulings to hold the Act of 1882 constitutional." We understand that the District Judge by this statement referred to the decision of this Court in the case of King vs. Mullen, 171 U. S. 404, which construed the Constitution and Statute of West Virginia providing a forfeiture of lands for failure to have the same assessed with taxes for five successive years, and held such provision valid and constitutional. If the Court below based its decision

upon the King vs. Mullen case then it wholly misconceived the effect of that case. That case related to forfeitures for failure to assess with taxes, and held that the State Constitution and Statute furnished due process of law because "the statutes provide the taxpayer a reasonable opportunity to protect his lands in a judicial proceeding, of which he is entitled to notice, and in which the Court has authority to relieve him upon reasonable terms, from the forfeiture." See Syllabus 5. That decision was reached by considering the forfeiture provisions and the provisions for a sale of the property as part of one system, and as that system required a judicial proceeding for the sale of the property and notice to the owner, making him a party to that proceeding, and permitting him to assert his rights and redeem in that proceeding the system so arranged was held to furnish due process of law.

But in the case at bar the proceeding was not under the forfeiture law for failure to assess, but under the law directing a sale of lands for the non-payment of taxes, which not only does not provide for any judicial hearing or opportunity to complain of the proceedings, but by its express terms takes away all power or right on the part of the owner to complain of any irregularities in making sale for taxes. The system providing for sales for taxes makes it impossible for the irregularities to appear of record, and at the same time says that, unless such irregularities appear of record, the title passes. The mouth of the owner is absolutely and arbitrarily closed. In King vs. Mullen the law was held valid because the system referred to in it expressly provided a judicial proceeding in which the owner should have notice and an opportunity to protect his rights, but under the tax sale law all right to complain or be heard in *any* proceeding is expressly taken away from the owner. We contend that the principles of the case of King vs. Mullen clearly indicate that the tax sale act of 1882 does not furnish due process of law and is unconstitutional because the system provided by it takes away all remedy.

STATE DECISIONS.

The act of 1882 gives a good title, notwithstanding any irregularity in the sale proceedings not appearing of record. Apparently there can be but one construction of this provision, viz: that the owner can not be heard to urge anything in the way of an objection to the proceedings which the records do not show. That this is the effect of the statute has been decided by the highest Court of West Virginia in a number of cases.

It has decided that the provisions of the 25th section of the Act "does not authorize the introduction of parol testimony to affect the validity or invalidity of a tax deed."

McCallister vs. Cottrill, 24 W. Va., 173, 174.
Carrell vs. Mitchel, 37 W. Va., 136.

And in the case of Winning vs. Eakin, 44 W. Va., 19, 29, the owner was not permitted to raise the question of whether the sale had been made between the hours fixed by the statute. The Court said (44 W. Va., 30): "The statute does direct the Sheriff as to this, but nowhere says he shall incorporate it in his report. The form of list of sales is given by the statute and contains no such matter."

STRICT COMPLIANCE WITH THE STATUTE NECESSARY.

It is proper at this point to ascertain what has heretofore been generally considered necessary in executing the tax sale laws in order to pass a good title to the purchaser.

The rule as laid down may be concisely stated as demanding that all the preliminary requirements of the

statutes, and designating the various proceedings which are to culminate in the sales, should have been strictly complied with, and that the officers who execute the power should follow with precision the course marked out for them by the law, and that the conditions subsequent to the sale, if any, should be duly observed.

Black on Tax Titles, §155.
Cooley on Taxation, 470.
25 Am. and Eng. Ency. Law, 374.
Williams vs. Peyton, 4 Wheat., 78.
Thatcher vs. Powell, 6 Wheat., 119.
Roulendorff vs. Taylor, 4 Pet., 349.
Early vs. Doe, 16 How. (U. S.), 610.
Braxton vs. Rich, 158 U. S., 375.
Marx vs. Hanthorn, 148 U. S., 172.
Yancy vs. Hopkins, 1 Munf., 419.
Wilson vs. Bell, 7 Leigh, 24.
Martin vs. Snowden, 18 Gratt., 100.

A great many similar cases may be cited, and while the course of the West Virginia decisions may not have had blazed upon it always that they were pursuant to this principle, yet a tendency has always been apparent to follow it.

DUE PROCESS OF LAW IN TAX PROCEEDINGS.

Many cases have been cited in which the question of what is due process of law in assessments and sales for taxes has arisen. Invariably the rule has been followed, that where the law gives to the party aggrieved by improper assessment or sale the opportunity to be heard in legal proceedings, and to contest therein the legality and validity of the assessment or the sale, this has been considered as furnishing due process of law. But it has been always considered essential that somewhere, somehow, and at some time, the party aggrieved should have the privilege of seeking the protection of some legally constituted tribunal or court and have his rights adjudi-

cated therein. Where this right is taken away or is unprotected the statute does not provide due process of law.

McMillen vs. Anderson, 95 U. S., 37.
Hagar vs. Reclamation Dist., 111 U. S., 701, 712, note citing many cases, and 713, note citing statutes recognizing rights in assessment matters.
Kentucky Railroad Tax Cases, 115 U. S., 321.
King vs. Mullen, 171 U. S., 404.
Scott vs. Toledo, 1 L. R. A., 688.
Speer vs. Mayor of Athens, 9 L. R. A., 402.
Kuntz vs. Sumption, 2 L. R. A., 655.

TAX DEED OR RECORD OF TAX SALES CANNOT BE MADE MADE CONCLUSIVE EVIDENCE OF TITLE.

There have been many statutes making tax deeds *prima facie* evidence of the regularity of the proceedings, and *prima facie* evidence of title. Such acts have been sustained. But it has been just as definitely settled that the legislature cannot make the tax deed conclusive evidence of the regularity of the proceedings or of the tax purchaser's title to the land. It would not be due process of law to deprive the owner of his property by making his tax purchaser's claim to it conclusive.

Marx vs. Hanthorn, 148 U. S., 172.
Bannon vs. Burnes, 39 Fed. Rep., 892.
Kelly vs. Herrall, 20 Fed. Rep., 364.
Stoudenmire vs. Brown, 48 Ala., 699.
Calhoun vs. Fletcher, 63 Ala., 574.
McCready vs. Sexton, 29 Iowa, 356.
Powers vs. Fuller, 30 Iowa, 476.
Immegart vs. Gorgus, 41 Iowa, 439.
Abbott vs. Lindenboner, 42 Mo., 162.
Roth vs. Gabbert, 123 Mo., 21.
Larson vs. Dickey, 39 Neb., 463.
Cooley on Taxation, 521.

In the case at bar the deed is not made conclusive evidence of title in the purchaser, but by the mere return of the Sheriff that a sale has been made, notwithstanding any irregularity in the proceedings of sale not appearing of record, the title is vested in the purchaser at the tax sale. It is an absolute, conclusive and arbitrary provision transfering the property of one person to another without any opportunity to controvert any of the facts, even those absolutely jurisdictional, in the sale proceedings. It is in direct conflict with the decisions cited.

A statute making the deed *prima facie* evidence does not dispense with the performance of any of the requirements prescribed by law. It only shifts the burden of proof of such performance from the party claiming under the deed to the party attacking it.

Parkers vs. Overman, 18 How., 137.
Thomas vs. Lawson, 21 How., 331.

But the effect of the West Virginia statute in question is to dispense with the material requirements of the law, requirements which have heretofore everywhere been considered essential and jurisdictional. The officer making the sale is enabled to dispense with one or all of those requirements, make a truthful return under the statute, and yet a return which will conclusively and arbitrarily take away the property of the person in whose name the property is sold. He will not be heard in any Court or by any proceeding to say a word in protection of his rights, or to controvert the regularity of the proceedings, as to any irregularity not appearing of record; and as we have seen those irregularities would be the ones relating to the sale and jurisdictional in their effect.

ARBITRARY POWER CONFERRED.

Statutes conferring a purely arbitrary power upon officers are void. It is not the partial nature of the rule

so much as its *arbitrary* and *unusual character* which condemns it as not being due process of law.

Cooley's Const. Lim., 354.
Yick Wo vs. Hopkins, 118 U. S. 356, 370.
Minnesota vs. Barber, 136 U. S. 328, 329.
Collins vs. New Hampshire, 171, U. S. 30, 34.
Hurtado vs. California, 110 U. S , 535, 536.
Davidson vs. New Orleans, 18 How., 272.
Leeper vs. Texas, 129 U. S. 463.
Geoyza vs, Tiernan, 148 U. S. 662.
Duncan vs. Missouri, 152 U. S. 377.

In the case at bar the authority is conferred upon the officer selling to choose his own mode of selling, full liberty being given him to follow or disobey the statute. Again, having made it not only possible, but seemingly desirable to the officer to disobey the law, and also to return his record of sales in such a form as not to disclose his irregularities, the law again declares arbitrarily that the owner of the land shall not be permitted to show such irregularity in *any* proceeding. The record framed to conceal irregularities is made to conclusively pass the title.

The law furnishes an arbitrary, uncertain and unusual method of depriving a person of his property and it is void.

It is axiomatic in this land that there shall be no denial of justice, yet the statute in question is framed expressly providing for such denial of justice.

It is not necessary in order to raise the taxes necessary for the support of the government that the law should authorize arbitrary and wilful action by the officers and authorize and direct the concealment of such arbitrary and wilful action, and deny all remedy or hearing to the party aggrieved.

STATE DECISIONS UPON ACT OF 1882.

In the Court below counsel for the appellee claimed that the decisions of the State Court upon the Statute

must govern and that the rights of the owner of property sold for taxes must be governed by the statute.

The cases referred to by counsel have not attempted to pass on the constitutionality of the statute or to say whether it furnished due process of law.

The case of State vs. Sponagle, 45 W. Va. 415, 427 does pass on the constitutional provision for the forfeiture of lands, for failure to assess them with taxes, holding that such provision coupled with the statute under it are not in conflict with the Fourteenth Amendment of the Constitution of the United States as they give the owner of the property a hearing before he is finally deprived of his property. The case of King vs. Mullen, 171 U. S., already referred to in this argument, is upon these same forfeiture provisions and holds them valid as already stated because the statutes give the owner of the property a hearing. But neither King vs. Mullen nor State vs. Sponagle pass on the validity of the tax sale laws of West Virginia. Nor is there any West Virginia case which does pass on the validity of the statute in controversy in this case. The cases are confined to construing the mere words of the statute and indicating which irregularities come within the terms of the statute, and in none of them is the validity of the statute raised.

Winning vs. Eakin, 44 W. Va., 19, 21, 23 and 26.
State vs. Sponagle, 45 W. Va., 431.
Hayes vs. Heatherly, 36 W. Va., 633.
Phillips vs. Minear, 40 W. Va., 64.

Even if the State Court had passed on the validity of the statute in various decisions, this would not prevent this Court from determining whether the proceedings under the statute furnished due process of law. Some of the decisions cited by counsel for appellees recognize this.

State vs. Sponagle, 45 W. Va., 415, syllabus 4.

LACHES.

There has been no actual possession of the property in question by the tax purchaser. Under those circumstances laches will not be imputed to the owner of real estate sold for taxes though he fails for any length of time to bring a suit to set aside the tax deed. This has been held in a number of cases.

State vs. Sponagle, 45 W. Va., 415.
Simmons vs. Ward, 41 W. Va., 80.
Batton vs. Woods, 27 W. Va., 58.
Cook vs. Lasher, 19, C. C. A., 655.
U. S. vs. Insley, 130 U. S., 263.

DENYING EQUAL PROTECTION OF THE LAWS.

The way is open for a full consideration of the statute. It provides a system of procedure arbitrary and uncertain in its character and effects. It arbitrarily deprives the injured party of his property without any opportunity, at any time or in any Court, of questioning the validity of the sale even on the points which are jurisdictional. It gives to each sheriff selling the power to violate or comply with the law, as seems best to him. One officer may comply with, and the next violate, the law. In one county the Sheriff may obey the law. In the next he may go out into the country and sell the land at private sale to the person he wishes to favor. He can do this and truthfully comply with the law in making his return, and under the statute his action can never be questioned. Each Sheriff can make the law to suit himself, and his action is arbitrarily conclusive because what his action is does not appear of record. The law may be enforced against A's land in one manner and against B's in an entirely different manner. Both may be in violation of the law. Neither A or B have any remedy. In that sense they have "the equal protection of the laws;" that is, neither one have

any protection. But in the sense that the law should provide a method which must be used and used in the same way as to the land of every one sold for taxes they are denied the equal protection of the laws. Because one officer may by his manner of selling afford protection and the next deprive the land owner of all protection.

The statute does not furnish due process of law. Nor does it afford to the complainant the equal protection of the laws. The statute is unconstitutional. The sale and deed are null and void, and should be set aside.

C. D. MERRICK.

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Supreme Court of the United States.

WILLIAM J. TURPIN, *Appellant*,

AGAINST

J. B. LEMON AND A. W. LEMON, *Appellees*.

Appeal From the Circuit Court of the United States for the District of West Virginia.

FILED NOVEMBER 1, 1901.

Brief of McCluer & McCluer, on Behalf of the Appellees, by John G. McCluer.

STATEMENT OF CASE.

William J. Turpin, a citizen of the state of Pennsylvania, on the 30th day of April, 1874, purchased from Virginia S. Hill executrix and William H. Hill executor of Smith C. Hill two hundred and twenty-five (225) acres of land lying on the waters of Dutchman Run in the County of Ritchie and

state of West Virginia, for which a deed was duly made and delivered to him. In the year of 1879 100 acres of this land was sold for delinquent taxes for prior years, and was purchased by D. McGregor and James McKenney, which left 125 acres of the said tract still belonging to William J. Turpin. And this 125 acres was assessed to him for the years 1883 and 1884, as appears from Exhibits Nos. 2 and 3 filed with the complainant's bill in this cause, and a part of record between pages 8 and 9. Turpin it seems paid no attention to this land and paid no taxes, and it was returned delinquent for the non-payment of the same for the years 1883 and 1884, and was sold by the Sheriff of Ritchie County, for the said delinquent taxes on the 12th day of January, 1886. This appears from Exhibit No. 6 with printed record.

As will be hereinafter shown, Turpin had the right to redeem this land within a year from the time of the sale, to-wit, from the 12th day of January, 1886. This he did not do, and on the 3rd of February, 1887, a deed was made by G. W. Amos, clerk of the County Court of Ritchie County to J. B. Lemon and A. W. Lemon, the appellees, conveying this tract of land of 125 acres lying on Dutchman's Run, as aforesaid, the description of which is correctly set out in the bill of complaint as appears in record on page 2.

Turpin paid no taxes to the state and made no effort to pay any until about the 15th day of April, 1899, he proposed to the appellees to pay a part of these taxes and asked that they then re-deed him the land. This, they refused to do, and on the 15th day of April, 1899, he filed his bill in equity in the Circuit Court of the United States for the District of West Virginia, asking the court to declare the sale and deed made by G. W. Amos, Clerk of the County Court of Ritchie county, to J. B. Lemon and A. W. Lemon, for this 125 acres of land, to have been made without due process of law, and to declare the same null and void, and a cloud upon his title to the same; to set aside the same, and to declare the appellees without right, title or interest in said land. And further praying that the appellees be enjoined from interfering in any way

with the possession of the plaintiff of the said tract of land and his rights therein, and also prayed for general relief.

To this bill a demurrer was filed by the appellees, through their attorneys, McCluer & Forrer, on the 6th day of June, 1899,—as appears from page 16 of printed record; and on the 5th of August, 1899, an order was entered submitting the cause to the court upon demurrer to the complainant's bill; which order will appear on page 17 of printed record.

On the 14th day of August, the court having considered the cause upon the bill and demurrer of appellees,—sustained the demurrer and dismissed the complainant's bill at the cost of complainant. From this decree the plaintiff below appealed,—as will appear from pages 17 and 18 of Printed Record.

From the petition of appellant, William J. Turpin for an appeal, (filed before the Circuit Court of the United States for the District of West Virginia, on August 14th, 1900,) it will appear that there is really but one question brought before this court for consideration, and that question is, whether the laws of the state of West Virginia enacted with reference to the sale of delinquent lands for taxes in that state are contrary to the constitution of the United States. Other questions are raised by the complainant in his bill, but in his petition these seem to be waived, and the appellant relies upon, and rests his case on the single question of the unconstitutionality of these laws as enacted by the legislature of West Virginia.

Although in the assignment of errors on page 19, from the 8th and 9th assignments of error it would appear that the appellant complains that the court erred in sustaining the demurrer, because "No report of survey of said land was made and placed of record before the making of said deed, as required by the statute of West Virginia;" and also that the deed was void because the description was not sufficient to locate the land."

ARGUMENT.

In presenting the claims and views of the defendants

we will first consider the 8th and 9th assignment of errors found on page 19 of Printed Record. These errors as assigned are in keeping with the allegations contained in the complainant's bill, which were as follows:

1st. "It does not appear that the land was certified by the auditor of the state to the sheriff to be sold by him.

2nd. It does not appear that the Sheriff published notice of the sale as required by law.

3rd. It does not appear that the sale was made at the time required by law.

4th. It does not appear that the sale was made at the place designated.

5th. It does not appear that the sale was a public sale.

6th. It does not appear that the land was sold to persons who would take the least number of acres and pay the taxes thereon.

7th. It does not appear in general or specific terms that the sale was made in accordance with the provisions of the laws of the state of West Virginia."

It will be observed by reading the bill of complaint filed in this cause that it is admitted by the plaintiff that the statute of West Virginia met each and everyone of these objections contained in his bill as to the legality of this sale by the provision in section 25, chapter 31, page 219 of the Code of West Virginia, 1891, which is as follows: "And no irregularity, error or mistake in the delinquent list, or in the return thereof, or in the affidavit thereto, or in the list of the sales filed with the clerk of the County Court, or in the affidavit thereto, or in the recordation of such list or affidavit, or as to the manner of laying off any real estate so sold, or in the plat, description or report thereof, made by the surveyor, or other person shall, after the deed is made, invalidate or affect the sale or deed."

"And if the deed be valid under the sale for the state taxes it shall not be affected or impaired by any irregularity in the proceedings or sale for the County, District or other taxes, or any of them."

Now the affidavit prescribed by the statute of West Vir-

ginia to be appended to the list of land sold as follows: "I, A. B., Sheriff of the County of. .....do swear that the above list contains a true account of all the real estate within my county, which has been sold by me, (as well as a list of all real estate redeemed, and the name of the persons who redeemed the same) during the present year for the non-payment of taxes thereon, for the year.....and that I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate so help me God."..... Sheriff. "Sworn to and subscribed before me this.....day of.....&c."

So by reference to page 13 of Printed Record it will be seen that the sheriff of Ritchie County has substantially, if not literally complied with the requirements of the statute in this affidavit and also the affidavit attached to the lists of land sold by him.

Hence it is submitted to the court that no objection to any irregularity in the sale of this land can be made after the deed was executed by the clerk of the county court of Ritchie County to the defendants; and if such objection could be taken then the record itself will show that such objection is not well taken.

Section 15, chap. 31, Code of West Virginia, 1891, page 212 is as follows: "The owner of any real estate so sold, his heirs or assigns, or any person having a right to charge such real estate for debt, may redeem the same by paying to the purchaser his heirs, or assigns, within one year from the sale thereof, the amount specified in the receipt mentioned in the 10th section of this chapter, and such additional taxes thereon as may have been paid by the purchaser, his heirs or assigns, with interest on said purchase money, and taxes at the rate of twelve per centum per annum from the time the same may have been so paid."

The 10th section referred to is as follows: "Memorandum of real estate sold in the county of.....on this ..... day of..... 18.....for the non-payment of taxes charged thereon in the said county, for the year or years 18....."

(Here follows a statement similar to the lists as they appear on pages 10 and 11 of Printed Record.)

And then follows, "Received of ....the above sum of .....it being the whole amount paid by him for the purchase money of the real estate mentioned in this memorandum, including costs of publication and the fee for this receipt."

It further appears from page 12 of Printed Record that the land set forth in the bill of complaint in this cause, was sold by the Sheriff of Ritchie County in the month of January, 1886, (which by mis-print states 1896) for the non-payment of taxes for the years 1883 and 1884. And the affidavit annexed thereto, as appears on page 13 was made on the first day of February, 1886, and the deed made by the Clerk of the County Court to J. B. and A. W. Lemon was the 3rd day of February, 1887, and was admitted to record upon the 5th day of January, 1887. Thus, giving the plaintiff in this cause more than one year to take advantage of any irregularity, if any existed in connection with the proceedings had, the advertisement of, and sale of this property. No such objection was made; and after nearly twelve years from the date of this sale, and from the time it passed into the hands of the purchasers who have paid the taxes upon the same continuously from the date of the deed this plaintiff comes into a court of equity and asks that this sale be set aside.

Section 1, chapter 104, Code of West Virginia, 1901, under the head of "LIMITATIONS OF ENTRY ON, OR ACTION FOR LANDS" is as follows: "No person shall make an entry on, or bring an action to recover any land, but within ten years next after the time at which the right to make such entry or bring such action shall have first accrued to himself, or to some person through whom he claims."

Hence, even the right of the plaintiff to institute this proceeding for the recovery of this land, and to set aside the deed under which the defendants held was barred by the state of West Virginia on the 4th day of February, 1897, because the ten years from the execution of the deed had inter-

vened on the 4th day of February, 1897. And this suit was not instituted until the 15th day of April, 1899.

Passing over this view of the case we further submit, that each and every point raised by the plaintiff in his bill as to the legality of this tax sale is met by the decision rendered by the Supreme Court of West Virginia in the case of

Winning vs. Ekin, 44 W. Va. Rep., pgs. 27, 28, 29, 30, &c.

And in this case the court holds "That the land owner must avail himself of any defects before the deed is made; and if he does not he is presumed to have waived them, and cannot thereafter make use of them to avoid the deed."

It will be further noticed that it is not stated or claimed by the plaintiff in his bill that any tender was made to the defendant in this case within the twelve months from the date of the sale, and prior to the execution of the deed; but, on the contrary, it is admitted indirectly by the plaintiff that no tender was made until about twelve years after this deed was made by the Clerk of Ritchie County, to the defendants for this land. And then, it is not claimed by the plaintiff that he tendered the amount required by the laws of W. Va., to entitle him to redeem even though the tender had been made within the year allowed him to redeem. He says that he tendered an amount of money, but does not claim that he tendered the amount of the taxes, costs, &c, incurred by the defendants in the payment of the purchase money, for the survey and the deed and all the subsequent taxes with *twelve per cent interest.* The defendants do not deny that some money was tendered, but by their demurrer admit it. Yet, the defect in the pleading in failing to state the amount of taxes, but giving a gross sum claiming that that would have covered all with interest could but mean interest at six per cent, and hence, it is not well pleaded in the bill, because while the statute of West Virginia declares the legal interest is six per cent, yet it requires the party redeeming to pay 12 per cent as a penalty.

Nor does the plaintiff claim in his bill that he did that

which is required by the statute even within the twelve months; that is, that he tendered the payment of the taxes for each year with interest from the date of the payment thereof to the time that he made the tender. This cannot be inferred, and not being alleged therefore must be taken that it was not done.

Independent of the defects in said bill above referred to we state that this bill is defective in other respects, as follows: It is provided by the Code of West Virginia, 1891, section 25, chapter 31, page 218 that "A tax deed made pursuant to this act shall convey such title as was vested in the former owner or owners of the property, unless such irregularity appear on the face of such proceedings of record in the office of the Clerk of the County Court, *and be such as to materially prejudice and mislead the owner of the real estate so sold, as to what portion of the real estate was so sold, and when and for what years it was sold, and the name of the purchaser thereof*; not then, unless it be clearly proven to the court or jury trying the cause *that but for such irregularity the former owner of such real estate would have redeemed the same under the provisions of this statute.*

It is nowhere alleged in the complainant's bill that he has been materially prejudiced and mislead by any of the proceedings taken for the sale of this land, nor has he charged in his bill that but for such irregularity he would have redeemed the same as provided by law; hence, we submit to the court that the demurrer to this bill was well taken on this ground alone, because, these facts must be alleged and shown to the court before a bill of this character can be maintained.

Winning v. Ekin, et al, 44 W. Va. Rep., p. 25.

This statute of West Virginia deals with all real estate within the limits of the state alike. It is not class legislation in favor of, or against any special or particular class, but affects alike all of the land owners within the limits of the state and is uniform throughout the state; hence, it is not in violation of Article 10 of the Constitution of West Virginia.

WAS THIS TAX SALE DUE PROCESS OF LAW UNDER THE FIRST SECTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Taxes can be imposed and collected under a state law, and though property is seized and sold therefor without suit, it is due process, and does not violate the amendment.

"States as a general rule have the right of determining the manner of levying and collecting taxes on private property."

Witherspoon v. Duncan, 4th Wall. 210.

Judge Brannon in his work entitled "The Fourteenth Amendment" page 148, quoting from Cooley Com. Lim. 587 says, "Power to impose taxes is one so unlimited in force, so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it."

"The United States Constitution does not profess in all cases to protect against oppressive and unjust taxation by states."

Memphis Gas L. Co. v. Shelby County, 109 U. S., 398.

In McMillan vs. Anderson, 95th U. S. 37 it is held, "That the revenue laws of the state may be in harmony with the fourteenth amendment, though they do not provide that a person shall have opportunity to be present when a tax is assessed, or that it shall be collected by suit."

And again in Wulzen v. Board, 40 AM. St. R. I., the court there says "Taxes are not, as a general rule, collected by judicial proceedings, and the procedure resorted to for their imposition and collection may be properly recorded as due process of law if it conforms to customary usages" See also

Crandall v. Nevada, 6th Wall. 35.
Fallbrook v. Bradley, 164 U. S., 113.
McCullough v. Maryland, 4th Wheat., 317.

In Bells Gap. R. R. Co. v. Pennsylvania, 134 U. S. 232, and in Palmer v. McMahon, 133 U. S. 660, the court states this fact: "Process of taxation does not require the same kind of notice as in a suit at law or proceedings under *power of eminent d main.* It involves no violation of due process of law when executed according to customary forms and established usage."

This must be so, else the existence of government might be put in peril by delay attendant upon formal judicial proceedings for collection of taxes.

The best definition of due process of law which we can find is given in Hagar v. Reclamation Disct. 111 U. S., 701; and Merchant v. Pend. R. R. Co., 153 U. S., 387, as stated by the court. "It is sufficient to say that by due process of law is meant one which, following the forms of law is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained, and whereever it is necessary for the protection of the parties, it must be given them an opportunity to be heard respecting the justice of the judgment sought. The clause, therefore, means that there can be no proceeding against life, liberty or property which may result in deprivation of either, without the observance of those general rules established in our Supreme Court of Jurisprudence for the security to private rights."

SALE OF LANDS FOR THE BENEFIT OF THE SCHOOL FUND.

Chapter 105, Code of West Virginia, 1891, provides: "All waste and unappropriated land within this state, and all lands in this state heretofore vested in the state of Virginia by *escheat* forfeiture or *purchase at Sheriff's or collector's sale for delinquent taxes*, and not released and exonerated, *or redeemed within one year* according to law; all lands heretofore, or hereafter purchased for this state, at a sale thereof for taxes, and not redeemed within one year according to law, and all lands forfeited to this state for the failure to have the same entered

upon the land books of the proper county, and charged with the taxes thereon, as provided by law; shall: so far as the title thereof shall not be vested in junior grantees, or claimants, under the provisions of the Constitution and laws of this state be sold for the benefit of the school fund, in the manner hereinafter prescribed. The Auditor shall certify to the Clerk of the Circuit Court a list of all such lands, which in whole or in part lie in his county within sixty days after the title thereof shall vest in the state."

This act further provides that the commissioner of school lands shall report to the Circuit Court of the County in which the land lies once in each year a list of all tracts of land, in whole or in part; (referred to in section one.) and a suit shall be brought for the sale of these lands forfeited.

Any person may enter their appearance who has title to the land, or a claim against it at any time before the sale." It provides, for the publication of this list, a reference to the commissioner and the report of the commissioner, and then the sale by the commissioner of school lands under the decree of court.

This act was attacked as violating the State Constitution, and the Fourteenth Amendment of the Federal Constitution; in that, it deprived the land owner of property without due process of law.

In the case of the State v. Sponaugle and others, decided November 30th, 1898, and reported in 45th W. Va. Rep., page 415, and also State v. Cheney and others reported in 45th W. Va. Rep., page 415, the Supreme Court of West Virginia held that this legislation was consistent with the state and federal constitutions, and had been so declared in the case of King v. Mullins 171 U. S., 404, which opinion was rendered by Justice Harlan on the 31st of May, 1898.

In the second paragraph of the syllabus in this case is as follows: "If the statute of the state in connection with its constitution gives the tax-payers reasonable opportunity to protect his lands against a forfeiture he has no grounds to

complain that his property has been taken without due process of law."

The owners of real estate in West Virginia are required under her laws to pay annually a tax upon that land. And if they fail to pay, then, the statute law of West Virginia prescribes how the state may collect her taxes, which is, by a sale of the property so delinquent by the Sheriff of the County in which the real estate is situate. The owner of the property then has a right within twelve months from the date of the sale of the same by the sheriff to redeem by the payment of the amounts specified by statute, with twelve per cent interest, and also any taxes which the purchaser may have paid upon the said land subsequent to the date of his purchase with twelve per cent interest. If the owner fails to do this, then the statute further provides that the purchaser shall receive a deed for the said land from the Clerk of the County Court.

Now, this statute in connection with the Constitution of the state of West Virginia gave to his appellant (as to all other tax-payers) reasonable oppportunity to protect his lands against a sale; and if sold it still gave him a reasonable opportunity to redeem his land. And since he failed in both cases, that is, to either pay his taxes or to redeem his land as provided by statute after the same was sold, and within the year provided, he has no ground to complain that his property has been taken without due process of law.

And even though this law with reference to the sale of lands in West Virginia for delinquent taxes might be considered oppressive, yet, the National Supreme Court will not declare that this sale was not due process of law, because, "the constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the states" (only in mode or the manner of the enforcement of their collection) that is left to the state Constitutions, and the State laws.

Memphis Gas L. Co. v. Tax. Disct. of Shelby Co., Tenn. 109 U. S. page 398.

And this question is also discussed in

Francis Palmer, vs. McMahon, Receiver of taxes of the city of New York, 133 U. S., 660.

"Both the forfeiture and sale process were held valid by the courts of the State of Virginia long before the Fourteenth Amendment existed. The proceeding for the sale of land under the Statute of Virginia were not proceedings by suit *inter partes* but was an *ex parte* proceeding to sell the land with no provision for a hearing to the owner; and this is fully discussed in the cases of

McClure v. Maitland 24 W. Va. Rep. 561; and
McClure vs. Mauperture, 29th W. Va. Rep., 633.

And in Brannon on the Fourteenth Amendment, page 262 is the following: "The Virginia courts in several cases held that the Virginia statute proprio vigore without office found or inquisition judicial in its nature forfeited the land and invested the state with its title, and that such statutes were constitutional."

He further says "That while it is true that those decisions ante-dated the Fourteenth Amendment, but there was in the Virginia constitution a provision, that no one should be deprived of his property without due process of law."

And by reference to the Virginia authorities under Virginia Statutes it will be seen that the state of Virginia had long resorted by such forfeiting statute to the means therein prescribed, and ordinary process for the enforcement of the payment of her taxes were ancient, usual and due process for the enforcement of her rights against delinquent taxpayers long before the Fourteenth Amendment. And the Fourteenth Amendment does not affect these decisions, and as stated by Judge Brannon are not impugned by it.

The Virginia cases cited are as follows:

Wild v. Serpell, 10 Gratt. 405;
Statts v. Board, 10 Gratt. 400;
Levasser v. Washburn, 11 Gratt. 572;
Usher v. Pride, 15 Gratt. 190;
Armstrong v. Morrill, 14 Wall. 120.

And following in the line of these decisions the Supreme Court of the State of West Virginia in the case of the State against Sponaugle and others before cited, in third paragraph of syllabus states as follows: "Due process of law does not always require judicial hearing. It does in matters of purely judicial nature, but not in matters of taxation, or matters purely administrative."

And questions similar to that involved in this case are ably discussed in the opinion rendered in the

Slaughter House cases, 16 Wall. 78;
Hurtado v. Cal. 110 U. S. 537.

These cases deal principally with the rights of citizens as guaranteed by the constitution of the U. S. and which is regulated and enforced by the state legislature.

We therefore, insist that the decree of the Circuit Court of the United States for the Northern District of West Virginia sustaining the demurrer of the defendant to the complainant's bill, and dismissing the bill of complaint was right and should be affirmed.

J. G. McCLUER,
of McCluer & McCluer Atts. for Appellee.

Supreme Court of the United States.

No. 35.—October Term, 1902.

William J. Turpin, Appellant, vs. John B. Lemon et al. } On appeal from the Circuit Court of the United States for the District of West Virginia.

[November 3, 1902.]

This was an appeal from a decree of the Circuit Court for the District of West Virginia sustaining a demurrer to, and dismissing, a bill filed for the purpose of impeaching a tax sale and deed of certain lands, and of obtaining a judicial declaration that the defendants, who were purchasers under such tax deed, took no title to or interest in such lands.

The facts set forth in the bill were substantially as follows: On April 30, 1874, Turpin, a citizen of the State of Pennsylvania, purchased from the executors of one Smith C. Hill 225 acres of land in the county of Ritchie, West Virginia, and received a deed therefor. In the year 1879 100 acres of this land were sold for delinquent taxes for prior years, by which the quantity owned by Turpin was diminished to 125 acres, which were assessed to him for taxes for the years 1883 and 1884. Being absent from the State for several years, in poor health and unfit for business, he paid no attention to the land, which was returned delinquent for the non-payment of these taxes, and was sold by the sheriff of Ritchie County for such taxes on January 12, 1886. Having failed to redeem the land within the year allowed by law from the time of the sale, on February 3, 1887, some weeks after the expiration of the year, a deed was made by the clerk of the county court of Ritchie County to the defendants.

Nothing was done and no effort was made to pay these taxes until about February 21, 1899, when Turpin met the defendant, John B. Lemon, and tendered him the sum of one hundred and seventy-six dollars and fifty cents, to cover the amount of the taxes paid by the defendants in the purchase of the land, and all taxes paid by them subsequently, as well as the cost of all surveys, &c., which amount he now offers to pay into court; but Lemon refused to receive the money, and has since cut large quantities of timber and removed the same from the land.

Whereupon he filed this bill, which really raises but a single question, and that is, whether the laws of the State of West Virginia, enacted with reference to the sale of delinquent lands for taxes, are contrary to the Con-

stitution of the United States, or constitute due process of law within the Fourteenth Amendment. Other questions were raised in the bill, but in his petition for an appeal to this court the appellant rests his case upon the single question of the constitutionality of these laws.

Mr. Justice Brown delivered the opinion of the Court.

The general charge is made by the appellant in his assignments of error that the tax sale complained of in the bill, as well as the statutes of West Virginia, are obnoxious to the Fourteenth Amendment of the Constitution in failing to provide due process of law or the equal protection of the laws.

The particular errors which are alleged in the bill to invalidate the sale in question are—

That it nowhere appeared in the return of the sale made by the sheriff for these taxes, either (1) that the land had been certified to him as delinquent by the auditor of the State as required by law, or (2) that he published or posted the notice of the sale as required by law, or (3) that said sale was made at a time at which he would be authorized by law to make such sale, or (4) that such sale was at a place, to wit, at the front door of the courthouse, at which the sheriff was authorized to make it, or (5) that such sale was made at public auction, or (6) that such land was sold to a person or persons who would take the least number of acres and pay the taxes thereon, or (7) that such sale was made in accordance with the provisions of the law of the State.

In making sales of land for unpaid taxes the procedure indicated by the above exceptions is undoubtedly required by the statute, the provisions of which are so numerous that they do not require citation. It will be observed, however, that there is no allegation in the bill that such requirements were not actually followed, but simply that the return of the sale failed to set forth a compliance with them. It is true the bill avers that the statements in the tax deed of a compliance with the law, "*as the record evidence shows*, were without foundation in fact." This, however, is but a restatement of the proposition theretofore stated more particularly, that the return did not show that the successive steps laid down by the statute were followed. That the pleader did not intend thereby to charge that the statutory procedure was not actually pursued is evident from the plaintiff's brief, that, "while the proceeding may have been conducted under this statute, yet the system provided is arbitrary and uncertain in its character," &c. As the statute does not require the sheriff to show in his return of sale that he has complied with these requirements, or any of them, or even to state in general terms that the sale was made in accordance with the statutes, the plaintiff fails to show that he has suffered any actual injury, or that the forms of law were not literally observed.

The act of 1882, ch. 130, secs 12 and 13, specially provides a form of return of the sale as follows:

"12. The sheriff or collector who made the sale shall forthwith make out a list of sales so made, with a caption thereto in form or effect as follows: 'List of real estate sold in the county of ——— in the month (or months, as the case may be), of ——— eighteen ——, for the non-payment of the taxes charged thereon, in the said county, for the year (or years, as the case may be), eighteen———.' Underneath shall be the several columns mentioned in the tenth section of this chapter, with a like caption to each column.

"13. There shall be appended to such list an affidavit in form or effect as follows: 'I, A— B——, sheriff (or collector or deputy for C— D—, sheriff or collector), of the county of —— —, do swear that the above list contains a true account of all the real estate within my county which has been sold by me during the present year, for the non-payment of taxes thereon for the year ——, and that I am not directly or indirectly interested in the purchase of any of said real estate. So help me God.' Which oath shall be subscribed and taken before some person authorized to administer oaths."

By section 15 of the same chapter "the owner of any real estate so sold, his heirs or assigns, or any person having a right to charge such real estate for a debt, may redeem the same by paying to the purchaser, his heirs or assigns, within one year from the sale thereof, the amount specified in the receipt mentioned in the tenth section of this chapter, and such additional taxes thereon as may have been paid by the purchaser, his heirs or assigns, with interest on said purchase money, and taxes at the rate of twelve per centum per annum from the time the same may have been so paid." No attempt was made by the plaintiff to comply with this statute.

By section 19 of the same chapter it is provided that after the expiration of the year the purchaser may obtain from the clerk of the county court of the county in which said sale was made a deed of conveyance for the land; and by section 25, when the purchaser shall have obtained a deed thereof, "and caused the same to be admitted to record, . . . such right, title and interest in and to said real estate, as was vested in the person or persons charged with the taxes thereon for which it was sold, . . . shall be transferred to and vested in the grantee in such deed, notwithstanding any irregularity in the proceedings under which the same was sold, not herein provided for, unless such irregularity appear on the face of such proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was so sold, and when and for what year or years it was sold, or the name of the purchaser thereof; and not then, unless it be clearly proved to the court or jury trying the case, that but for such irregularity the former owner of such real estate would have redeemed the same under the provisions of this chapter." This

same section further declares in a subsequent clause that "no irregularity, error or mistake in the delinquent list or the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the county court, or in the affidavit thereto, or in the recordation of such list or affidavit, or as to the manner of laying off any real estate so sold, or in the plat, description or report thereof made by the surveyor or other person, shall, after the deed is made, invalidate or affect the sale or deed."

The substance of this legislation, then, is this: that a certain procedure is prescribed for the sheriff in making sales of land for unpaid taxes; but it is not required that he incorporate the various steps of such procedure in his report of sales—merely that he shall swear that the list of lands to which his affidavit is appended contains a true account of all the real estate within the county sold by him during the current year for the non-payment of taxes, and that he is not directly or indirectly interested in the purchase of any such real estate. A year is then allowed for redemption, after the expiration of which, a deed of the land is executed to the purchaser at the sheriff's sale by the clerk of the county court, which deed, the statute provides, shall not be invalidated by reason of any irregularity in the proceedings under which the land was sold, unless such irregularities appear upon the face of such proceedings of record in the office of the clerk, and be such as to materially prejudice and mislead the owner.

Counsel for the plaintiff criticizes this legislation, and particularly section 25, upon the ground that it does not provide for any record of the successive steps of procedure in advertising and selling lands for the non-payment of taxes, and yet declares that the title to the land shall be vested in the purchaser, notwithstanding any irregularity, unless such irregularity appears upon the face of the proceedings. The inference is that there is no irregularity which can vitiate the sale. This is not entirely accurate. It is true that the statute prescribes a general form of return by the sheriff, which does not set forth in detail the proceedings prior to and at the sale; but that there are irregularities which appear of record, and therefore that the exception in the curative statute is not without force, is evident from the case of *McCallister* v. *Cottrille*, (24 W. Va. 173,) in which it was held to be the official duty of the clerk of the county court to note in his office the day on which the sheriff returned his list of the sales of lands sold for delinquent taxes, and if he fails to make such note, or his office shows that such list was not returned and filed for more than ten days after the completion of such sales, this, in either case, is such an omission and irregularity as to materially prejudice the rights of the owner of lands sold at such sale, and therefore vitiates any deed made to the purchaser by the clerk. The court went further in this case, and held that parol evidence could not be introduced to affect the validity or invalidity of a tax deed. So, too, in *Carrell* v. *Mitchell*, (37 W. Va. 130, 136,) it was said the fact

that land was advertised and sold as delinquent under a description in the advertisement, locating it in a different district from that in which the land was situated, was such an irregularity as would void the deed made in pursuance of such sale. In *Hays* v. *Heatherly*, (36 W. Va. 613,) the title obtained by a purchaser was held to be defective for the reason that the affidavit did not comply with the form contained in the statute. In that case the deed had not been obtained; but in *Phillips* v. *Minear*, (40 W. Va. 58,) the same defect was held to be fatal after the deed was obtained and after the curative section (25) had taken effect. See also *Jackson* v. *Kittle*, (34 W. Va. 207;) *Baxter* v. *Wade*, (39 W. Va. 281.)

That it is competent for the legislature to provide by curative statutes that irregularities in the sales of lands shall not prejudice the purchaser after a certain time has elapsed, and a deed has been given, is entirely clear, although as observed by Judge Cooley in his work upon Taxation, chapter 10, such defective proceedings cannot be cured where there is a lack of jurisdiction to take them. "Curative laws may heal irregularities in action, but they cannot cure want of authority to act at all," and that "whatever the legislature could not have authorized originally it cannot confirm." It may not be altogether easy in a particular case to determine whether the defect be jurisdictional or not, but certainly irregularities in the personal conduct of the officer making the sale would not be so regarded; and it is at least exceedingly doubtful whether the failure to preserve the auditor's list of delinquent lands or the evidence of the publication and posting of the statutory notices would vitiate a deed made by the clerk, after a lapse of twelve years.

But, even if parol or other evidence were competent to impeach this sale, none such was offered, and it may well be doubted whether due process of law, within the meaning of the Fourteenth Amendment, requires a punctilious conformity with the statutory procedure preceding and accompanying the sale. Whether all the steps required by law were actually taken in a particular case, and whether the failure to take such steps would invalidate the sale, would seem to be a matter for the State courts, rather than for this court, to decide, and it would appear that the Fourteenth Amendment would be satisfied by showing that the usual course prescribed by the State laws required notice to the taxpayer and was in conformity with natural justice. Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. (*Spencer* v. *Merchant*, 125 U. S. 345; *Huling* v. *Kaw Valley Railway*, 130 U. S. 559; *Hagar* v. *Reclamation District*, 111 U. S. 701;

Paulsen v. *Portland*, 148 U. S. 149.) But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary. Due process of law was well defined by Mr. Justice Field in *Hagar* v. *Reclamation District*, (111 U. S. 701,) in the following words: "It is sufficient to say that by due process of law is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must be given them an opportunity to be heard respecting the justice of the judgment sought. The clause means, therefore, that there can be no proceeding against life, liberty or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security to private rights."

It was said in *Witherspoon* v. *Duncan*, (4 Wall. 210,) that the States, as a general rule, had the right to determine the manner of levying and collecting taxes upon private property, and could declare a tract of land chargeable with taxes, irrespective of its ownership, or in whose name it was assessed or advertised, and that an erroneous assessment did not vitiate the sale. In *McMillen* v. *Anderson*, (95 U. S. 37,) it was held that due process of law did not require that a person should have an opportunity to be present when the tax was assessed against him, or that the tax should be collected by suit; and in *Kelley* v. *Pittsburg*, (104 U. S. 78,) that the general system of procedure for the levy and collection of taxes, established in this country, is, within the meaning of Constitution, due process of law. In *Bell's Gap R. R. Co.* v. *Pennsylvania*, (134 U. S. 232, 239,) it was held that the process of taxation did not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. "It involves no violation of due process of law when it is executed in accordance to customary forms and established usages, or in subordination to the principles which underlie them."

The main objection to section 25, above quoted, seems to be that it makes the deed conclusive evidence of the regularity of all proceedings not appearing of record, and hence that it is obnoxious to the ruling of this court in *Marx* v. *Hanthorn*, (148 U. S. 172,) in which we held that as the legislature could not deprive one of his property by making his adversary's claim to it conclusive of its own validity, it could not make a tax deed conclusive evidence of the holder's title to land.

But conceding this to be so, there is another section proper to be considered in this connection, and that is section 29, which reads as follows:

"29. In all cases in which a question shall arise as to any such sale or deed, or the effect thereof, such deed shall be *prima facie* evidence against the owner or owners, legal or equitable, of the real estate at the time it was sold, his or their heirs and assigns, . . . that the person named in the deed as clerk of the county court was such, that the sheriff or other officer who made the sale was such sheriff or officer as stated in such deed, *that the material facts therein recited are true*, that such estate as is mentioned in the twenty-fifth section of this chapter vested in the [grantee in the deed."

Assuming the common law rule to be, as stated by the elementary writers upon taxation, that the purchaser at a tax sale is bound to take upon himself the burden of showing the regularity of all proceedings prior thereto, it is entirely clear that statutes declaring the tax deed to be *prima facie* evidence, not only of regularity in the sale, but of all prior proceedings, and of title in the purchaser, are valid, since the only effect of such statutes is to change the burden of proof which rested at common law upon the purchaser and cast it upon the party who contests the sale. Indeed, the validity of these acts was expressly affirmed by this court in *Pillow* v. *Roberts*, (13 How. 472, 476,) and *Williams* v. *Kirkland*, (13 Wall. 306.)

Even if the provisions of section 25, making irregularities of a sale immaterial, were invalid, it would still result that under section 29 the facts recited in the deed would be presumed to be true, and the burden be thrown upon the landowner of disproving them. This burden the plaintiff has not assumed, but he is content to rely, and stake his whole case, upon the fact that the return of the sheriff did not show a compliance with the procedure marked out by the statute. Even if it were admitted that due process of law required the observance of all the steps prescribed by this statute, it does not demand that they shall be made matter of record, much less that they shall be made matter of a particular record, such for instance as the return of the sheriff of the sale of the lands. Under the Fourteenth Amendment, the legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice; but it is not bound to provide that the particular steps of a procedure for the collection of such taxes shall be proven by written evidence; and it may properly impose upon the taxpayer the burden of showing that in a particular case the statutory method was not observed. The fact that the return of the sheriff does not recite the various steps of the procedure when the statute does not contemplate that it shall do so, is no evidence whatever that they were not followed to the letter. If the plaintiff had alleged that in the proceedings for the sale of these lands the sheriff had failed to comply with the law, and the defendant had pleaded that by the curative section (25), irregularities not appearing of record would not vitiate the deed, the constitutionality of that section would properly be raised; but the plaintiff in this case was content to put his bill upon the

ground that the record, namely, the sheriff's return of sale, did not set forth that the procedure prescribed by statute, preceding and accompanying the sale, had been followed. This is an effort to test the constitutionality of the law without showing that the plaintiff had been injured by its application, and in this particular the case falls within our ruling in *Tyler* v. *Judge of Registration*, (179 U. S. 405,) wherein we held that the plaintiff was bound to show he had personally suffered an injury before he could institute a bill for relief. In short, the case made by the plaintiff is purely academic. For ought that appears, the proceedings may have been perfectly regular, and his bill rests solely upon the proposition that there may have been irregularities in the sheriff's sale, and that, if there were, the statute validating the deed, notwithstanding such irregularities, is unconstitutional, and deprives him of his property without due process of law. This proposition contains its own answer.

The exact case then made by the bill is this: The plaintiff seeks to avoid a sale made twelve years before by an allegation that the record, namely, the sheriff's return of the sale, does not show a compliance with the statute in certain particulars, without also averring that in fact there was a failure to perform some step required by law. To hold a sale invalid upon these allegations might result in upsetting every sale for taxes made in West Virginia for the past twenty years.

We are of the opinion that no case is made by the bill, that the judgment of the Circuit Court is correct, and it is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.